No. 91-1695-CFX
Status: GRANTED

Title: Pioneer Investment Services Company, Petitioner
v.
Brunswick Associates Limited Partnership, et al.

Docketed:
January 27, 1992

Court: United States Court of Appeals for
the Sixth Circuit

Counsel for petitioner: Donaldson,Craig J.

Counsel for respondent: Lucas,John A.

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Entry	Date	Note	Proceedings and Orders
1	Jan 27 1992	G	Petition for writ of certiorari filed.
2	May 21 1992		Brief of respondents Brunswick Associates Limited, et al. in opposition filed.
3	May 27 1992		DISTRIBUTED. June 12, 1992
4	Jun 15 1992		Petition GRANTED.
			**********
5	Jul 30 1992		Joint appendix filed.
6	Jul 30 1992		Brief of petitioner Pioneer Investment Services, Co. filed.
7	Sep 1 1992		Record filed.
		*	Original proceedings U. S. District Court for the Eastern District of Tennessee. (1 BOX)
8	Sep 1 1992		Brief of respondents Brunswick Associates Limited Partnership, et al. filed.
9	Sep 11 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Sixth Circuit.
10	Oct 5 1992		Reply brief of petitioner filed.
11	Oct 13 1992		SET FOR ARGUMENT MONDAY, NOVEMBER 30, 1992. (4TH CASE).
12	Oct 15 1992		CIRCULATED.
13	Nov 30 1992		ARGUED.

No. 91-1695

Supreme Court, U.S.
FILED
JAN 27 1992
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PIONEER INVESTMENT SERVICES, COMPANY,
Petitioner,

—VS.—

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP, AND WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Respondents, claimants in Petitioner's chapter 11 case, received actual notice of the deadline fixed by the bankruptcy court for filing proofs of claim (the "Bar Date") at least three (3) months before the expiration of the Bar Date. Respondents retained experienced bankruptcy counsel and provided him with a complete copy of their file on Petitioner's chapter 11 case, including the written notice of the Bar Date, at least one and one-half (1 1/2) months before the expiration of the Bar Date. Respondents did not file their proofs of claim and they did not file a motion for an extension of time within which to do so before the expiration of the Bar Date. Twenty (20) days after the expiration of the Bar Date, Respondents filed a motion to extend the time to file their proofs of claim. Respondents' claimed that

their failure to timely file their proofs of claim was the result of excusable neglect. Respondents' claim of excusable neglect was based solely on the ground that their bankruptcy counsel had experienced a disruption in his practice, as a result of his withdrawal from his then firm, and that his file on Petitioner's chapter 11 case was unavailable to him. The questions presented are:

1. Whether the interpretation of excusable neglect, that the failure to timely perform was due to circumstances beyond the reasonable control of the party, which has been adopted and applied by the majority of the circuit courts of appeals, should be established by this Court as the proper interpretation of excusable neglect under Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure.

2. Whether the interpretation of excu-

sable neglect adopted by the United States Court of Appeals for the Sixth Circuit, which represents the minority view and considers factors other than the Respondents' actions and the reasons for those actions, is the appropriate interpretation to be used in determining whether Respondents established excusable neglect, within the meaning of Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure, for failing to timely file their proofs of claim;

3. Regardless of which of the two definitions of excusable neglect is applied, whether Respondents established excusable neglect, under either definition, within the meaning of Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure, to allow them to file their proofs of claim after the expiration of the Bar Date, where the uncontroverted facts established that

Respondents' failure to timely file their proofs of claim resulted solely from the negligence of their bankruptcy counsel and his indifference to the Bar Date.

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Sixth Circuit are listed in the caption.

CORPORATE PARTY'S AFFILIATION

Petitioner has no parent companies, subsidiaries (other than wholly-owned subsidiaries) or affiliates.

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No. _____

SUPREME COURT OF THE UNITED STATES
October Term, 1991

PIONEER INVESTMENT SERVICES COMPANY,

Petitioner,

vs.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP, AND WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App.A, infra, 1a-11a) is reported at 943 F. 2d 674. The opinions of the district court (App. B and App. D. infra, 1b-20b; 1d-24d) are not reported. The opinion of the bankruptcy court, after remand from the district court, (App.C, infra, 1c-27c) is not reported. The

original opinion of the Bankruptcy Court (App. E, infra, 1e-39e) is reported at 106 B.R.510. The order of the Court of Appeals denying Petitioner's petition for rehearing appears in Appendix F.

JURISDICTION

The judgment of the Court of Appeals (App. A. infra, 1a-11a) was entered On September 6, 1991. A timely petition for rehearing and timely suggestion for rehearing in banc was denied on October 28, 1991 (Appendix F, infra, 1f). This petition for certiorari is being filed within the prescribed period of ninety (90) days after October 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 1111 of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2579, codified at 11 U.S.C. §1111(a), pro-

vides:

> "A proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated."

2. Rule 2002 of the Federal Rules of Bankruptcy Procedure provides, in pertinent part:

> "Except as provided in subdivisions (h), (i) and (l) of this rule, the Clerk or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of
>
> * * * * * *
>
> (8) the time fixed for filing proofs of claims pursuant to Rule 3003(c)"

3. Rule 3003(c)(2) and (3) provide:

> "(2) any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; and creditor who fails to

do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

(3) the court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), and (c)(4)."

4. Rule 9006(b)(1) provides:

"except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or order of the court, the court for cause shown may at any time in its discretion (1) with or without motion or notice or the period enlarged if the request therefore is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect."

STATEMENT OF THE CASE

On April 12, 1989, Pioneer filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code and a list of its twenty largest unsecured creditors. This list included all of the Respondents except Ft. Oglethorpe Associates Limited Partnership ("Ft. Oglethorpe"). Pioneer sought and obtained from the Bankruptcy Court an extension of time through May 17, 1989, within which to file its schedules of assets and liabilities and statement of financial affairs.

On April 13, 1989, the clerk of the bankruptcy court mailed a Notice for a Meeting of Creditors to interested parties. This notice set May 5, 1989, as the date for the meeting of creditors required by 11 U.S.C. §341 and fixed August 3, 1989, as the Bar Date for unsecured creditors, which Respondents were, to file proofs of claim. The notice provided, in pertinent part:

> You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 U.S.C. §1111 and Bankruptcy Rule 3003.

Bar Date is August 3, 1989

The first meeting of creditors actually was held on May 19, 1989, and it was adjourned. On May 18, 1989, Pioneer filed its statement of financial affairs and schedules of assets and liabilities. Respondents were not listed on the original schedules. On May 25, 1989, Pioneer amended its schedules to include all of the Respondents except Ft. Oglethorpe. Ft. Oglethorpe was not listed and the other Respondents' claims were listed as disputed, contingent and unliquidated.

On June 5, 1989, the United State Trustee appointed the Chapter 11 Creditors Committee. One of the Respondents, Clinton Associates Limited Partnership ("Clinton"), was a member of the committee from its inception.

Mark A. Berlin ("Berlin") an experienced businessman, attorney and certified public accountant, was the president of Robriste

Enterprises, Inc., the corporate general partner of all Respondents except Ft. Oglethorpe, and he was the president of Pudding Enterprises, Inc., the corporate general partner of Ft. Oglethorpe. Prior to May 5, 1989, Berlin received and read the April 13, 1989 Notice for a Meeting of Creditors.

On June 16, 1989, the adjourned first meeting of creditors was held. Berlin appeared on behalf of all of the Respondents just as he had at the May 19, 1989 meeting of creditors. Marc Richards ("Richards"), who was retained by all of the Respondents in mid-June, 1989, also appeared on behalf of all of the Respondents at the June 16, 1989 meeting.

Richards was an experienced bankruptcy attorney. At the time Respondents retained him, Berlin provided Richards with a complete copy of Respondents' file on Pioneer's chapter 11 case. The file contained the April 13,

1989 Notice for a Meeting of Creditors. Berlin retained a copy of the documents provided to Richards. Richards reviewed Respondents' file pripr to the June 16, 1989 meeting of creditors.

Respondents did not file their proofs of claim before the August 3, 1989 Bar Date. On August 23, 1989, twenty (20) days after the expiration of the Bar Date, Respondents filed a motion to extend the time to file their proofs of claim.

Respondents claimed, in their motion, that their failure to timely file their proofs of claim was the result of excusable neglect. Respondents made only one argument, which focused on their actions and the reasons for those actions, to support their claim. Respondents argument was that Richards had experienced a disruption in his practice in late July, 1989, as a result of his withdrawal from

his then firm, and that his file was unavailable to him. Neither Respondents nor Richards explained why Richards simply did not request from Berlin a copy of the duplicate file maintained by Berlin.

After an evidentiary hearing, the bankruptcy court held that Respondents had failed to prove excusable neglect within the meaning of Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure ("Rule 9006(b)(1)"), and denied Respondents' motion. The bankruptcy court, relying on the decision of the United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit") in In re South Atlantic Financial Corp., 767 F.2d 814 (11th Cir. 1985), cert. den., sub. nom. Biscayne 21 Condominium Associates, Inc. v. South Atlantic Financial Corp., 475 U.S. 1015 (1986), held that, in order to establish excusable neglect, Respondents had to prove that

their failure to timely file their proofs of claim was due to circumstances beyond their reasonable control (App. E, infra 18e-28e). The bankruptcy court, relying on the decisions of the United States Court of Appeals for the Third Circuit (the "Third Circuit") in In re Vertientes, 845 F.2d 57 (3rd Cir. 1988); of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") in Maressa v. A.H. Robins Co., 839 F.2d 220 (4th Cir. 1988); and, by analogy, of this Court in Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988); held that an extension of time under Rule 9006 (b)(1) could not be granted for equitable reasons such as no prejudice to the debtor and lack of impact on efficient court administration (App. E., infra 30e-36e).

On the initial appeal to the district court, the district court reversed holding that the more liberal interpretation of excu-

sable neglect, as enunciated by the Ninth Circuit Bankruptcy Appellate Panel in In re Dix, 95 B.R. 134 (9th Cir. B.A.P. 1988), should apply in determining whether Respondents had proved that their failure to timely file their proofs of claim was the result of excusable neglect. (App. D, infra, 14d-18d). The district court remanded the case to the bankruptcy court for reconsideration of Respondents motion under the more liberal interpretation of excusable neglect, cautioning that the decision of the bankruptcy court would be reversed only for an abuse of discretion. (App. D, infra, 21d).

On remand, the bankruptcy court applied the undisputed facts of the case to the Dix factors and, again, concluded that Respondents had failed to prove excusable neglect. (App. C, infra, 1c-27c). The bankruptcy court found that the delay would not prejudice Pioneer,

that the length of the delay would not adversely impact efficient court administration, and that Respondents had acted in good faith (App. C, infra, 13c-20c). However, the bankruptcy court found that the delay was not beyond the reasonable control of the Respondents and that it was appropriate to penalize Respondents for Richards' neglect (App. C., infra, 15c-19c. Finally, the bankruptcy court found that Respondents' failure to timely file their proofs of claim resulted strongly from Richards' negligence, but also from his indifference to the Bar Date. (App. C, infra, 21c).

The bankruptcy court, after making these findings of fact, concluded that more weight must be accorded to the facts found against the Respondents, stating "For this Court to hold that the partnerships' late-filed claims are to be allowed as timely filed, notwithstanding that both the partnerships and their

attorney had actual knowledge of the August 3, 1989 claims' bar date and ample time to file proofs of claims, would render nugatory the fixing of the claims' bar date in this case." (App. C, infra, 22c).

The bankruptcy court, on the issue of whether Respondents should be penalized for Richards' negligence, distinguished the facts of this case from the facts of the Dix case. In Dix, unlike this case, the creditor did not have actual knowledge of the bar date prior to its expiration (App. C, infra, 17c). Also, and perhaps more importantly, the attorney, whose negligence was sought to be attributed to the claimant in Dix, was the attorney for the debtor, not the claimant. In re Dix, 95 B.R. 134, 139 (9th Cir. B.A.P. 1988).

On Respondents' second appeal to the district court, the district court affirmed (App. B, infra 1b-20b). The District Court

held that none of the bankruptcy court's findings of fact were erroneous and that the bankruptcy court's conclusion "was one legitimately within the discretion accorded to the bankruptcy court." (App, B, infra, 11b).

On appeal, the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit") reversed the decision of the district court, affirming the decision of the bankruptcy court, denying Respondents leave to file their proofs of claim out of time (App. A, infra, 1a-11a). The Sixth Circuit agreed with the district court's conclusion that the more liberal interpretation of excusable neglect, as stated in Dix, should be applied, holding that "..., we believe the Dix factors should be applied as aids for case-by-case adjudication, rather than a necessary or complete list of the factors to be considered (App. A., infra, 8a).

However, the Sixth Circuit disagreed with the district court's conclusion that the bankruptcy court did not abuse its discretion in denying Respondents' motion to file their proofs of claim after the expiration of the bar date. The Sixth Circuit rested its decision squarely on its conclusion that "it [the Bankruptcy Court] inappropriately penalized the plaintiffs [Respondents] for the errors of their counsel." (App. A, infra, 9a). The Sixth Circuit, solely on the basis of this conclusion, then determined that four of the five Dix factors weighed in favor of the Respondents. (App. A, infra, 11a). The Sixth Circuit also held that allowing the Respondents to file their claims late would result in no prejudice to Petitioner (App. A, infra, 11a).

On September 20, 1991, Petitioner timely filed its motion for rehearing and its sugges-

tion for rehearing in banc. Pioneer argued that the Sixth Circuit's decision, adopting the more liberal interpretation of excusable neglect, as stated in Dix, clearly conflicted with the decision of the Eleventh Circuit in South Atlantic, and that its consideration of equitable factors, such as no prejudice to the debtor, was in clear conflict with the decisions of the Third Circuit in Veritentes, the Fourth Circuit in Maressa, and the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") in In re Robintech, Inc., 863 F.2d 393 (5th Cir. 1989). cert. denied sub nom., Bullock v. Oppenheim, Appel, Dixon & Co., _____ U.S. _____ (1989).

Pioneer also argued that the Sixth Circuit's decision, finding that the bankruptcy court inappropriately penalized Respondents for the errors of their counsel, was, as a matter of law, in direct conflict with the

decision of this Court in Link v. Wabash Railroad Company, 370 U.S. 626 (1962), reh. den 371 U.S. 873 (1962). In Link, this Court held that a party could not avoid the consequences of the acts or omissions of its attorney because "any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" Id. at 633-634.

Pioneer also pointed out to the Sixth Circuit that the facts of this case clearly were distinguishable from the facts in the Dix case. The critical distinction between the Dix case and this case is that the attorney, whose negligence was sought to be attributed to the claimant, was not the attorney for the claimant-he was the attorney for the debtor.

Understandably, the court in Dix held that the claimant should not be penalized for the neglect of the debtor's attorney. Here, however, Richards was not the attorney for the debtor, he was the attorney for the Respondents. Accordingly, it was appropriate, as the bankruptcy court and the district court found, to penalize Respondents for Richards' negligence.

On October 28, 1991, the Sixth Circuit denied Pioneer's motion for rehearing and suggestion for rehearing in banc.

REASONS FOR GRANTING THE PETITION

This case presents three compelling reasons for granting the Petition For a Writ of Certiorari. These reasons, which are addressed below seriatim, are: (i) the decision of the Sixth Circuit is in clear and direct conflict with the decision of another circuit court of appeals on the issue of the correct

interpretation of the term excusable neglect in Rule 9006 and with the decisions of five other circuit court of appeal on the issue of whether equitable factors are relevant in determining such a motion; (ii) the Sixth Circuit has decided an important question of federal law, i.e. the interpretation of the term excusable neglect under Rule 9006(b)(1), in conflict with decisions of other circuit courts of Appeals, which question has not been, but should be, settled by this Court, because there should be a uniform interpretation of this Rule applicable to all cases, regardless of the circuit in which the case is filed; and (iii) the Sixth Circuit has decided a federal question, i.e. whether a party in litigation in federal court may avoid the consequences of the negligence of its counsel, in a way that directly conflicts with an applicable decision of this Court.

I. THE DECISION BELOW CONFLICTS WITH PRIOR JUDICIAL INTERPRETATION OF "EXCUSABLE NEGLECT" AND FACTORS RELEVANT TO MAKING SUCH A DETERMINATION, INCLUDING DECISIONS OF THE SECOND, THIRD, FOURTH, FIFTH AND ELEVENTH CIRCUITS

The decision of the Sixth Circuit in this case is in clear and direct conflict with the decision of the Eleventh Circuit in In re South Atlantic Financial Corporation, 767 Fed. 2d. 814 (11th Cir. 1985), cert. den. sub nom., Biscayne 21 Condominium Association v. South Atlantic Financial Corporation, 475 U.S. 1015 (1986) on the issue of the interpretation of the term excusable neglect in Rule 9006(b)(1). In the South Atlantic case, the Eleventh Circuit interpreted excusable neglect under Rule 9006(b)(1), as requiring the movant to show that "the failure to timely perform a duty was due to circumstances which were beyond a reasonable control of the person whose duty it was to perform." 767 F. 2d. at 817. In this

case, the Sixth Circuit declined to adopt the Eleventh Circuit's interpretation of excusable neglect and, instead, adopted what it characterized as "a more textured approach, relying upon the five part test adopted by the Ninth Circuit Bankruptcy Appellate Panel in Dix.

The decision of the Sixth Circuit in this case, to the extent that it considers relevant factors other than the actions of the claimant and the reasons for those actions, also is in direct conflict with the decision of the Eleventh Circuit in the South Atlantic case. In South Atlantic, the Eleventh Circuit determined, from the plain language of Rule 9006(b)(1), that the focus of the rule is on the claimant's actions and the reasons for those actions, not on the effect that an extension might have on the other parties' positions. 767 F. 2d. at 818-19. In this case, the Sixth Circuit considered and, in part, based its

decision on one such factor, i.e. no prejudice to the debtor.

Moreover, the decision of the Sixth Circuit is in clear and direct conflict with the decisions of other circuit courts of appeals to the extent it considers prejudice to the debtor, or any other equitable considerations. See, Hoos & Co v. Dynamics Corporation of America, 570 F. 2d. 433, 439 (2nd Cir. 1978) ("This clear Congressional intent to require filing of valid proofs of claim within the established time limits that it has set is sufficient to preclude us from finding exceptions to those rules in the supposed interest of equity"); Maressa v. A.H. Robins, 839 F. 2d. 220, 221 (4th Cir. 1988) ("The clear Congressional intent to require filing of valid proofs of claim within the established time limits precludes any exceptions based on general equitable principles. While

the effects of the bar date appear harsh, any other result would undermine the clear purpose of the Bankruptcy Rules."); In re Vertientes. Ltd., 845 F. 2d 57, 60 (3rd Cir. 1988) ("The court has no discretion to grant and extension simply because no prejudice would result, or for any other equitable reason."); In re Robintech, Inc., 863 F. 2d 393 (5th Cir. 1989), cert. den. sub nom., Bullock v. Oppenheim, Appel, Dixon & Co., _____ U.S. _____, (1989) ("Moreover, because such procedures are thought to be necessary to protect the bankrupt and creditors, exceptions cannot be made every time a creditor claims hardship.")

Thus, the decision of the Sixth Circuit, considering, as it does, factors such as no prejudice to debtor and other equitable considerations, clearly conflicts with the decisions of five other circuit courts of appeals.

As Petitioner argues below in more detail, the decision of the Sixth Circuit also is in clear conflict with Congressional intent, as derived from the plain language of the Bankruptcy Code and the Bankruptcy Rules, which intent requires the filing of valid proofs of claim within the established time limits.

Finally, the decision of the Sixth Circuit in this case, to the extent that it holds that mere inadvertence, oversight or neglect of counsel is sufficient to establish excusable neglect under Rule 9006, is in clear and direct conflict with the decision of the Eleventh Circuit in the South Atlantic case. This decision also is in clear and direct conflict with the decisions of other circuit courts of appeal interpreting Rule 6(b)(2) of the Federal Rules of Civil Procedure, ("Rule 6(b)(2)") which Rule also allows untimely

filings upon a showing of excusable neglect. McLaughlin v. City of LaGrange, 662 F. 2d 1385 (11th Cir. 1981), cert. den., 456 U.S. 979 (1982); Graham v. Pennsylvania Railroad, 342 F. 2d 914 (D.C. Cir. 1964), cert. den., 381 U.S. 904 (1965); Davidson v. Keenan, 740 F. 2d 129 (2d Cir. 1984). Indeed, the decision of the Sixth Circuit appears to conflict with the decision of this Court in Lujan v. National Wildlife Federation, 110 U.S. 3117 (1990) which suggests that when a party has notice and sufficient time to act, but fails to do so, the party fails to establish excusable neglect under Rule 6(b)(2), the language of which is identical to Rule 9006(b)(1).

II. THE DECISION BELOW PRESENTS AN IMPORTANT FEDERAL QUESTION WITH SIGNIFICANT IMPACT ON THESE GOALS OF CERTAINTY AND FINALITY IN CHAPTER 11 CASES WHICH CONGRESS INTENDED WHEN IT ENACTED THE BANKRUPTCY CODE AND BANKRUPTCY RULES

The Sixth Circuit has decided an impor-

tant question of federal law which has not been, but should be, settled by this Court, especially since the decision of the Sixth Circuit is in clear and direct conflict with the decisions of five other circuit courts of appeals. At issue, is the scheme established by Congress which requires the holders of claims against a chapter 11 debtor to file their claims within established time limits to promote certainty and finality.

Section 1111(a) provides, in pertinent part, "A proof of claim or interest is deemed filed under section 501 of this title...except a claim or interest that is scheduled as disputed, contingent or unliquidated." Rule 3003(c) provides, in pertinent part, "Any creditor or equity security holder whose claim or interest is not scheduled or is scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the

time prescribed by subdivision (c)(3) of this rule;..." Rule 3003(c)(3) provides, in pertinent part, "The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." Rule 2002(a)(8) provides that creditors shall be given not less than twenty days notice by mail of the time fixed for filing proofs of claim pursuant to Rule 3003(c).

Unlike the decision of the Sixth Circuit in the case, the decisions of the Second Circuit in Hoos, the Third Circuit in Vertientes, the Fourth Circuit in Maressa, the Fifth Circuit in Robintech, and the Eleventh Circuit in South Atlantic, all recognize the clear Congressional intent, as expressed by the plain language of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, to require filing of proofs of claim within the time limits set to promote certainty and finality.

To hold, as the Sixth Circuit did in this case, that bankruptcy courts must consider untimely claims whenever any sort of excuse is asserted, destroys the objectives of certainty and finality which Congress intended to promote when it enacted the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

This most important question of federal law has not been addressed by this Court and, in view of the conflict among the circuit courts of appeals, it should be. This case presents this Court with the opportunity not only to resolve a conflict among the circuits, but also to settle, once and for all, the important question of the correct interpretation of the phrase excusable neglect in Rule 9006(b)(1).

III. THE COURT OF APPEALS VIOLATED THE EXPRESS HOLDING OF THIS COURT IN LINK v. WABASH RAILROAD COMPANY BY HOLDING THAT IT WAS INAPPROPRIATE TO PENALIZE RESPONDENTS FOR THE NEGLIGENCE OF THEIR BANKRUPTCY COUNSEL

The decision of the Sixth Circuit, that a party should not be penalized for the negligence of its counsel, directly conflicts with the decision of this Court in Link v. Wabash Railroad Company, 370 U.S. 626 (1962), reh den, 371 U.S. 873 (1962).

In Link, the district court sua sponte dismissed plaintiff's diversity negligence action against the defendant. 370 U.S. at 627. The district court notified counsel for plaintiff and defendant of the scheduling of a pre-trial conference to be held on a date and time certain. Id. at 627. On the day of the pretrial conference, plaintiff's counsel did not appear. The district court dismissed the action. Id. at 628-629. The court of appeals affirmed. Id. at 629. This court, in affirming the decision of the court of appeals, affirming the district court's dismissal of the action, stated:

> "There is certainly no merit to the contention that dismissal of Petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or remissions of his freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and it considered to have 'notice of all facts, notice of which can be charged upon the attorney.'"

Id. at 633-634.

In this case, the Sixth Circuit found "that the partnerships [Respondents] in all likelihood relied on the expertise of their experienced bankruptcy counsel and paid no further heed to the matter." (App. A. infra, 9a). This decision of the Sixth Circuit, which, in effect, holds that it is an unjust penalty on the Respondents to deny their motion to file their claims out-of-time because of Richard's negligence, is in direct

conflict with the holding of this Court in Link. Indeed, in view of decision of this Court in Link, it was not only appropriate, but also mandatory, for the bankruptcy court to penalize the Respondents for the negligence and indifference of their counsel.

The decision of the Sixth Circuit reaches a result which this Court, thirty years ago, in Link, prohibited, i.e. visiting the sins of Respondents' counsel upon the Petitioner. 370 U.S. at 634. As this Court stated in Link, if counsel's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. 370 U.S. at 634. Respondents have exercised their remedy by filing a malpractice action against Richards. To afford Respondents the additional relief, as the Sixth Circuit would do, of being able to file their proofs of claim out-of-time,

reaches a result which this Court already has said Respondents are not entitled to receive.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Craig J. Donaldson
Riker, Danzig, Scherer,
Hyland & Perretti
Attorneys for Petitioner
Pioneer Investment Services
Company

APPENDIX A

No. 90-6339

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PIONEER INVESTMENT SERVICES COMPANY,
Debtor.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP, and WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP,
Plaintiffs-Appellants,

v.

PIONEER INVESTMENT SERVICES COMPANY,
Defendant-Appellee.

} ON APPEAL from the United States District Court for the Eastern District of Tennessee

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Decided and Filed September 6, 1991

Before: JONES and NORRIS, Circuit Judges; and JOINER, Senior District Judge.*

NATHANIEL R. JONES, Circuit Judge. Plaintiffs-appellants Brunswick Associates Ltd. ("Brunswick"), Clinton Associates Limited Partnership ("Clinton"), Ft. Oglethorpe Associates Limited Partnership ("Ft. Oglethorpe"), and West Knoxville Associates Limited Partnership ("W. Knoxville"), appeal the district court's order affirming the Bankruptcy Court's decision denying their motion for leave to file their proofs of claim out of time. For the reasons that follow, we reverse.

I.

The facts giving rise to this appeal are uncontested. On April 12, 1989, the debtor-appellee Pioneer Investment Services Company ("Pioneer") filed its voluntary petition for bankruptcy under Chapter 11 of the United States Bankruptcy Code. At the same time, Pioneer filed a list of its twenty largest unsecured creditors. This list included Brunswick, Clinton and W. Knoxville. Pioneer asked for and was granted extensions by the bankruptcy court through May 17, 1989, within which to file its statement of affairs and the relevant schedules.

On April 13, 1989, a Notice for a Meeting of Creditors was mailed by the bankruptcy court clerk's office to the parties in interest setting May 5, 1989 as the date for the creditor's meeting required under Section 341(a) of the Bankruptcy Code. This notice also fixed August 3, 1989, as the bar date for filing proofs of claim by unsecured creditors. This notice specifically provided as regards the bar date:

> You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated,

*The Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.

> is unlisted or you do not agree with the amount. See 11 U.S.C. § 1111 & Bankruptcy rule 3003.
>
> Bar date is August 3, 1989.

J. App. at 175 (quoting notice). The bankruptcy court found that Mark A. Berlin, president of Robriste Enterprises, Inc., general partner of Clinton, W. Knoxville, and Brunswick, and president of Pudding Enterprises, Inc., general partner of Ft. Oglethorpe, received and read the April 13, 1989 notice. The court also found that Berlin is an experienced businessman engaged in real estate and financial management, an attorney licensed to practice in Florida and New York and a certified public accountant.

The bankruptcy court found that Berlin attended and participated in the May 5, 1989 meeting of creditors. The records to the creditor's meeting held on May 19 also indicate that Berlin entered an appearance on behalf of the partnerships.

Prior to the May 19 meeting, Pioneer filed its statement of financial affairs and the relevant schedules. The plaintiffs are not listed on the schedules as originally filed. However, on May 25, Pioneer amended its schedules to include Clinton, W. Knoxville and Brunswick as creditors holding contingent unliquidated, and disputed claims. Ft. Oglethorpe is not listed on the schedules as a creditor.

On June 5, the United States Trustee filed his "Appointment of Committee of Unsecured Creditors" designating Clinton as a member of the creditors' committee. Berlin, representing Clinton, was a member of this committee from its inception.

The plaintiffs collectively retained Marc Richards as their legal counsel. The bankruptcy court found that Richards was retained in mid-June and was an experienced bankruptcy attorney. Berlin's affidavit also suggests that Richards was provided with a complete copy of the

bankruptcy file for all the partnerships and that the file contained the above-mentioned notice for filing proofs of claim. The testimony also indicates that Richards advised Berlin that there was no bar date in the file and that therefore, filing proofs of claim was not a matter of urgency.

On August 23, 1989, twenty days after the expiration of the bar date, the plaintiffs filed their proofs of claim. The claims were signed on behalf of Clinton, W. Knoxville, and Brunswick by "Mark A. Berlin, President of Robriste Enterprises, Inc. (General Partner)." The claim filed on behalf of Ft. Oglethorpe is signed "Mark A. Berlin, President Pudding Enterprises, Incorporated (General Partner)." The plaintiffs acknowledge that they filed the proofs of claim after the bar date and that they did not file any petition for an extension of time to file such proofs of claim. However, they claimed below, and claim before this court, that the bar date for filing should have been extended as their failure to timely file was due to "excusable neglect", or, in the alternative, that their claims should be allowed *nunc pro tunc* to the bar date.

The bankruptcy court denied the plaintiffs' motion to file their claims late, finding no "excusable neglect" within the meaning of the bankruptcy rules and no reason to exercise its equity power to allow the filing of the claims *nunc pro tunc*. The plaintiffs then appealed to the district court. While the district court accepted all of the bankruptcy court's factual findings, the court found that the bankruptcy court had applied an overly strict interpretation of "excusable neglect" and the court remanded for reconsideration under a more liberal standard. On remand the bankruptcy court again found that, even under the more liberal interpretation of "excusable neglect" there was no basis for allowing the plaintiffs to file their claims out of time. The plaintiffs again appealed and the district court affirmed. This timely appeal followed.

II.

We review the factual findings of the bankruptcy court under a clearly erroneous standard. Bankr. R. 8013. Whether the court properly found that a proof of claim was filed late due to "excusable neglect" is reviewed for abuse of discretion. *In re Yoder Co.*, 758 F.2d 1114, 1117 (6th Cir. 1985).

Section 1111(a) of the Bankruptcy Code requires creditors to file a proof of claim in circumstances where a particular claim is "scheduled as disputed, contingent, or unliquidated." 11 U.S.C. § 1111(a). In this case the plaintiffs acknowledge that they were required to file a proof of claim. Bankruptcy Rule 3003(c) requires the court to set a time within which proofs of claim may be filed and authorizes the court to extend such time limit "for cause shown." Bankr. R. 3003(c)(3). It appears to be well-established that Bankruptcy Rule 3003 must be read in conjunction with Rule 9006(b), which guides courts as to how and when extensions of time may be granted. *See, e.g., In re Vertientes, Ltd.*, 845 F.2d 57, 60 (3d Cir. 1988); *In re South Atlantic Fin. Corp.*, 767 F.2d 814, 817 (11th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986); *In re Dix*, 95 B.R. 134, 137 (Bankr. 9th Cir. 1988). Rule 9006(b) provides:

> (b) Enlargement
>
> (1) In General. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act

was the result of excusable neglect.

Bankr. R. 9006(b)(1). In this case, no request for extension of time was made prior to the expiration of the bar date, therefore, the court only has discretion to extend the time for "excusable neglect." *See, In re Vertientes*, 845 F.2d at 59 (court only has discretion to grant extensions as permitted in the two circumstances outlined in Rule 9006(b)(1)).

This court has never defined "excusable neglect" as it relates to the filing of late proofs of claim. Though the question was raised in *In re Yoder*, the court decided the case on other grounds and declined to adopt either a strict or a liberal interpretation of the term. 758 F.2d at 1118 and n.4. The bankruptcy court in the instant action originally adopted the strict interpretation of "excusable neglect" following the Eleventh Circuit. Under this view, "excusable neglect" could only be found when the failure to timely perform was due to circumstances beyond the reasonable control of the party. *In re South Atlantic Fin. Corp.*, 767 F.2d at 817. Other courts have also indicated a tendency to read the procedural requirements of the Bankruptcy Rules and notices strictly in order to further the purpose of quick and effective settlement of bankrupt estates. *See, e.g., In re Robintech, Inc.*, 863 F.2d 393, 397-98 (5th Cir. 1989), *cert. denied sub nom., Bullock v. Oppenheim, Appel, Dixon & Co.*, 110 S. Ct. 55 (1989); *Maressa v. A. H. Robins Co.*, 839 F.2d 220, 221 (4th Cir. 1988); *In re Vertientes*, 845 F.2d at 60-61. Reasoning from these and other similar precedents, the bankruptcy court determined that the proper interpretation of the "excusable neglect" rule was a strict one.

On its initial review, the district court reversed, arguing that Sixth Circuit precedent interpreting rules analogous to Bankruptcy Rule 9006(b) indicated a more liberal approach to the concept of excusable neglect. For example, in *INVST Financial Group Inc. v. Chem Nuclear Systems, Inc.*, 815 F.2d 391, 397-400 (6th Cir.), *cert. denied sub nom., Garrett v. INVST Financial Group Inc.*,

484 U.S. 927 (1987), this court interpreted Fed. R. Civ. P. 60(b), which governs motions to set aside default judgments as a result of "excusable neglect." In that case, the court indicated that trial courts must examine a number of factors including prejudice to the plaintiff, the merits of the defendant's defenses and any culpable conduct on the part of the defendant in determining whether a Rule 60(b) motion satisfies the "good cause" or "excusable neglect" standards. *Id.* In addition, in *In re Winner Corporation*, 632 F.2d 658, 660-61 (6th Cir. 1980), this court reversed a district court's dismissal of a bankruptcy appeal, holding that the late filing of a designation of the record on appeal under former Bankruptcy Rule 806 would not justify dismissal of the appeal in the absence of a finding of negligence or indifference on the part of the appellant.

Reasoning from these precedents, the district court concluded that this court would likely adopt an approach similar to the approach taken by the Ninth Circuit in *In re Dix*, 95 B.R. 134 (Bankr. 9th Cir. 1988) with respect to the proper interpretation of "excusable neglect." In *Dix*, the court articulated five factors to be considered in order to determine whether a creditor satisfied Bankruptcy Rule 9006(b)'s requirement of excusable neglect:

> (1) whether granting the delay will prejudice the debtor;
>
> (2) the length of the delay and its impact on efficient court administration;
>
> (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform;
>
> (4) whether the creditor acted in good faith; and
>
> (5) whether clients should be penalized for their counsel's mistake or neglect.

95 B.R. at 138. The district court also suggested that on remand the bankruptcy court should consider whether the filing of the late proofs of claim resulted from negligence, indifference or culpable conduct on the part of the moving creditors or their counsel following the standards laid out by the court in *INVST Financial Group*, 815 F.2d at 398-99.

The parties understandably are split over which approach this court should adopt with respect to the application of Rule 9006(b). We find that the district court correctly interpreted this court's precedent to suggest a more textured approach to the "excusable neglect standard." In this regard, we find the *Dix* factors to be helpful in determining when a party has failed to timely file its proof of claims based upon excusable neglect. However, we believe that the *Dix* factors should be applied as aids for case-by-case adjudication, rather than a necessary or complete list of the factors to be considered.

That said, we turn to the analysis of the bankruptcy court's decision below. Essentially, the appellants' position is that the bankruptcy court on remand did not properly apply the *Dix* factors as directed by the district court. Specifically, the appellants claim that, in the guise of applying the *Dix* factors, the court simply reasserted the strict requirement that parties may only be excused for failure to timely file if that failure was beyond the reasonable control of the party whose duty it was to file. However, we find the plaintiffs' characterization of the bankruptcy court's opinion to be inaccurate. The bankruptcy court considered each of the *Dix* factors individually on remand, and essentially based it decision on the fact that Berlin, an experienced businessman and lawyer, and Richards, an experienced bankruptcy attorney, had actual notice of the bar date and simply failed to meet it. The court further found that Richards was negligent in failing to file the proofs of claim by the bar date and that his actions indicated an indifference to the bar date and the orders of the court.

While we find that the bankruptcy court did apply the *Dix* factors as directed by the district court on remand, it inappropriately penalized the plaintiffs for the errors of their counsel. As noted by the bankruptcy court, the ultimate responsibility of filing the plaintiffs' proof of claims rested with the plaintiffs' counsel Richards. There was evidence in the record to suggest that Mr. Berlin specifically inquired with Richards about the deadline for filing the proof of claims and that Richards had told him that there was no urgency. There was no finding by the bankruptcy court that the plaintiff partnerships were guilty of negligence, bad faith or culpable conduct. In light of the fact that Richards affirmatively told Berlin that there was no urgency with regard to the filing deadline, we find that the partnerships in all likelihood relied on the expertise of their experienced bankruptcy counsel and paid no further heed to the matter.

We also find it significant that the notice containing the bar date was incorporated in a document entitled "Notice for Meeting of Creditors." Such a designation would not have put those without extensive experience in bankruptcy on notice that the date appended to the end of this notice was intended to be the final date for filing proof of claims. Official Bankruptcy Form 16 provides a model for notifying creditors of a proof of claims deadline in a Chapter 11 bankruptcy.

> The debtor [or trustee] has filed or will file a list of creditors and equity security holders pursuant to Rule 1007. Any creditor holding a listed claim which is not listed as disputed, contingent or unliquidated as to amount, may, but need not, file a proof of claim in this case. **Creditors whose claims are not listed or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim on or before *[Insert Date]*, which date is hereby fixed as the last day for filing a proof of claim[.]**

(emphasis added). While we do not suggest that the court was obligated to notify creditors in precisely this form, the comparison between this Form 16 notice and the notice actually given in this case suggests the dramatic ambiguity of the latter. This ambiguity is exacerbated by the fact that the notice was simply and inconspicuously labeled "Bar date" without any reference to its significance as a deadline for the filing of proof of claims. Even persons experienced in bankruptcy might confuse such a label for other deadlines. For example, the term "bar date" is also used to describe the deadline for filing objections to a debtor's discharge under Rule 4007(c).

The uncontroverted evidence below established that while Berlin was an experienced businessman, he had no experience or expertise in bankruptcy. Thus, even if he could be attributed with having seen the "Notice for Meeting of Creditors" he should not necessarily have been attributed with understanding the significance of the date contained therein. This factor, when taken with Richards' representations regarding the filing deadline, and the peculiar and inconspicuous placement of the bar date in a notice regarding a creditor's meeting convince us that the bankruptcy court unjustifiably punished the plaintiffs for the sins and neglect of their lawyer.

Turning back to the *Dix* factors, the bankruptcy court specifically found that there would be no prejudice to the debtor as a result of the delay in plaintiffs' filing, that the delay would not be disruptive of efficient court administration, and that there was no bad faith or culpable conduct on the part of the plaintiff partnerships. As described above, we find that the court erred in attributing the negligence of plaintiffs' attorney to the partnerships. Further, since Richard's negligence was responsible for the twenty-day delay in filing, and since the plaintiffs, through Berlin, specifically asked counsel regarding the filing deadline and were assured there was no problem, we do not find the fact that timely filing was not beyond the control of the plaintiffs to be determinative.

In sum, then, four of the five *Dix* factors weigh unequivocally in favor of the plaintiffs. Further, this court in the context of default judgments has held that absent prejudice to the plaintiff or culpable conduct on the part of the defendant, the policy of hearing claims on the merits weighs in favor of allowing the claims to go forward. *See INVST Financial Group*, 815 F.2d at 398-99. As the court put it, "Default judgments should not be used to discipline attorneys; it is the client who suffers by being deprived of his day in court." *Id.* at 400. We find the same considerations should guide us when analyzing the impact of a failure to meet a filing deadline for proof of claims if the fault is clearly attributable to the attorney, and no prejudice results to the debtor.

III.

For the aforementioned reasons, the decision of the district court affirming the bankruptcy court's decision refusing to accept the plaintiffs' late proof of claims is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

FILED
SEP 12, 1990

In re: PIONEER INVESTMENT SERVICES COMPANY, Debtor-in-Possession. BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, et al., Appellants, v. PIONEER INVESTMENT SERVICES COMPANY, Appellee.	)	No.CIV-3-90-0666
BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, et al., Appellants, v. PIONEER INVESTMENT SERVICES COMPANY Appellee.	)	NO. CIV-3-90-_____

MEMORANDUM OPINION

These are appeals from orders entered by the United States Bankruptcy Court for the Eastern District of Tennessee in the case under chapter 11 of the Bankruptcy Code of Pioneer Investment Services Company ("PISCO"). The appellants are four limited partnerships, Brunswick Associates Limited Partnership ("Brunswick"), Clinton Associates Limited Partnership ("Clinton"), Ft. Oglethorpe Associates Limited Partnership ("Ft. Oglethorpe"), and West Knoxville Associates Limited Partnership ("West Knoxville Associates").

This Court, acting on the appellants, motion, consolidated these appeals, and gave them expedited consideration. [See doc. 6 in No. CIV

3-90-0666.] The Court heard oral argument on September 5, 1990.

The earlier-filed appeal, No. CIV 3-90-0666, is from the Bankruptcy Court's June 8, 1990 decision denying the appellants' motion for leave to file their proofs of claim after the bar date. The later-filed appeal is from the Bankruptcy Court's decision, rendered on August 17, 1990, that the appellants may not participate in proceedings in PISCO's case in bankruptcy, because they are not creditors Of PISCO. [See doc. 4, collective ex. 6 in No. CIV 3-90-0666.]

The record on appeal for the later-filed appeal has not been delivered to the Clerk of this court. Furthermore, at the oral argument on September 5, 1990, counsel for Genefin S.A., another creditor of PISCO, appeared end argued that Genefin S.

A. should also be a party to this later-filed appeal, because the Bankruptcy Court's ruling on the appellants' standing to participate in proceedings in this case in bankruptcy was instigated at least in part by the motion for a protective order of Genefin S.A., seeking to Protect itself from discovery requested by the appellants for the purpose of establishing that Genefin S.A. is an insider with respect to the debtor, PISCO. Counsel for Genefin S.A. and counsel for the debtor argued that, with respect to the later-filed appeal, the appellants had failed to name in their notice of appeal the parties to the order appealed from, as is required by Bankruptcy Rule 8001 (a) and Bankruptcy Rules, Official Form No. 35.

The Court allowed the debtor to file a brief concerning this standing issue, an d allowed Genefin S .A. until Monday,

September 10, 1990 to file a brief on the same issue. In light of the current posture of the later-filed appeal, and the fact that the Court is ready to address the issue raised in the earlier-filed appeal, the Court will set aside its earlier Order consolidating these appeals, and rule in this Memorandum Opinion on the issue presented in No. CIV 1-90-0666.

The background of the earlier-filed appeal is set forth in this court's Memorandum Opinion filed on February 20, 1990 in another case arising out of the same case in bankruptcy, No. CIV 3-89-0927 in this Court. [See doc. 2, ex. A in No. CIV 3-90-0656.] After the Bankruptcy Court below first denied the appellants' motion for leave to file their proofs of claim after the bar date, this Court reversed the Bankruptcy Court's decision and remanded this contested matter to the Bankruptcy

Court for reconsideration of the appellants' motion in light of the five factors listed in In re Dix, 95 Bankr. 134 (B.A.P. 9th Cir., 1988), and also to determine whether the appellants' failure to file their proofs of claim timely resulted from negligence, indifference, or culpable conduct on the Part of the appellants or their counsel, applying INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F. 2d 391 (6th Cir.), cert. denied, sub nom. Garratt v. INVST Financial Group, Inc., 484 U.S. 927 (1987); and In re Winner Corporation, 632 F.2d 658 (6th Cir., 1980).

This Court noted in its Memorandum Opinion filed in No. CIV 3-89-0927 that "it [would] be for the Bankruptcy Court to determine how to weigh the relative importance of the various factors in this particular case and in other cases, since the determination of the presence or

absence of excusable neglect under Bankruptcy Rule 9006 (b) must be made case by case." This Court also warned the Parties that subsequent review of any decision made by the Bankruptcy Court on this issue after considering the listed factors would be according to the abuse-of-discretion standard, citing In re Dix, supra; and In re Vertientes, Ltd., 845 F.2nd 57 (3rd Cir. 1988).

In the Memorandum Opinion rendered from the bench on June 8, 1990, United States Bankruptcy Judge Richard Stair, Jr. reconsidered the appellants' motion in light of all of the factors required to be considered, assigned relative weights to those factors, and again denied appellants' motion for leave to file their proofs of clain after the bar date. The appellants have appealed from this decision in a timely manner.

The appellants have framed several issues on appeal, assigning error to the Bankruptcy Court's holding that the appellants should be penalized for the mistake or neglect of their counsel, to the Bankruptcy Court's finding that the appellants ' counsel had an indifferent attitude toward the bar date, to the Bankruptcy Court's assignment of relative weights to the factors considered by it upon remand, to the Bankruptcy Court's holding that the appellants had failed to show excusable neglect under Bankruptcy Rule 9006 (b), and to the Bankruptcy Court's denial of the appellants' motion for leave to file their proofs of claim nunc pro tunc the bar date. All of these assignments of error really state only one, that the Bankruptcy Court erred in refusing to allow the appellants to file their proofs of claim after the bar date.

Judge Stair did not make any erroneous findings of fact, and therefore this Court will not set aside any of hie findings of fact. Bankruptcy Rule 8013. In particular, this court finds Judge Stair's finding that the appellants' counsel had an indifferent attitude towards the bar date well supported by the record, since this attorney, an expert in bankruptcy matters, received copies of the notices addressed to three of the four appellants which stated the bar date in time to file proofs of claim timely, but advised the representative of his clients, the appellants, that there was nothing to worry about with respect to filing proofs of claim in the near future. Furthermore, counsel for the Parties conceded at the oral argument in No. CIV 3-89-0927 that there were no factual issues presented in that appeal. Since what the Bankruptcy

Court did upon remand was to reconsider the facts found by it earlier in light of the factors required to be considered, only the Bankruptcy Court's application of the law to the facts is presented for review in this appeal.

As this court stated in its Memorandum Opinion filed in No. CIV 3-89-0927, the Court's task in this appeal is to determine whether Judge Stair abused discretion by refusing to allow the appellants to file their proofs of claim after the bar date. The Court finds that he did not.

The appellants argue that the effect of Judge Stair's June 8, 1990 ruling was to ignore the In re Dix and INVST Financial Group factors, and to apply a stricter, beyond-reasonable-control reading of "excusable neglect" under Bankruptcy Rule

9006(b), but the less strict reading of excusable neglect mandated by this Court 's decision in No. CIV 3-89-0927 did not necessarily have to result in a reversal of the Bankruptcy Court's initial decision. Judge Stair' s conclusion in this case was one legitimately within the discretion accorded to the Bankruptcy Court, particularly in light of the evidence presented of the legal knowledge and business sophistication of the appellants' representative, Mark A. Berlin, and of the attitude of indifference shown by the appellants' then counsel, Marc E. Richards.

One remaining issue, which this Court found it unnecessary to address in deciding the appeal in No. CIV 3-89-0927, must be decided in this appeal. It is undisputed that no notice of the 11 U.S.C. ss 341 meeting of creditors stating the bar date addressed to one of the appellants,

Ft. Oglethorpe, was ever received by Ft. Oglethorpe. Ft. Oglethorpe argues that to bar it from filing a proof of claim after a deadline of which it never received formal notice deprives it of the due process guaranteed to it by the Fifth Amendment to the United States Constitution. This presents an issue of law to be considered de novo by this Court.

Some undisputed facts must be noted in deciding this constitutional issue. Mr. Berlin received three notices stating the bar date addressed to the other three appellants. Mr. Berlin was at all pertinent times the president of Pudding Enterprises, Inc., the corporate general partner of Ft. Oglethorpe. This Court noted in its Memorandum Opinion filed in No. CIV 3-89-0927 that Mr. Berlin attended the creditors' meeting in PISCO's case in bankruptcy on May 19, 1989, as the

representative of all four of the appellants. This Court also noted that counsel for the appellants conceded at the oral argument before this Court in No. CIV 3-89-0927 that Mr. Richards represented all of the appellants in the Bankruptcy Court. Therefore, in spite of the lack of formal notice to Ft. Oglethorpe, this creditor had actual notice through Mr. Berlin of the bar date, appeared in the proceedings in the Bankruptcy Court below, first by its representative and then by counsel, and participated in proceedings in this case .

These undisputed facts distinguish this case from the authorities upon which the appellants rely. In Tulsa Professional Collection Services, Inc. v Pope, 485 U.S. 478 (1988), in which the Supreme Court held that actual notice by mail, as opposed to publication notice, was required before the claim of a creditor of

a probate estate could be barred, the creditor did not have actual notice of the administration of the decedent's estate and of the bar date for filing claims against the estate.

City of New York v. New York, N.H. & R. Co., 344 U.S. 293 (1953), was decided not under the Due Process Clause, but under a provision of the Bankruptcy Act which required "reasonable notice" to creditors of a bar date for filing claims. In City of New York, there was only publication notice to the creditor, and not actual notice of the bar date. The Supreme Court held that the creditor's knowledge of the debtor's ongoing reorganization proceedings was not sufficient to put the creditor on inquiry to discover the bar date. Accord, Broomall Industries, Inc. v. Data Design Logic Systems, Inc., 786 F.2d 401 (Fed. cir. 1986) .

The decision of the court of appeals for this circuit in In re Yoder Company, 758 F.2d 401 (6th Cir. 1985), does not require reversal of Judge Stair's ruling, because the court of appeals in that case found the district court's finding that the creditor received notice of the bar date clearly erroneous.

This Court is persuaded by the reasoning in In re Terex Corporation, 45 Bankr. 290 (Bankr. N.D. Ohio 1985). In Terex Corporation, the widow of the original owner of a claim against the debtor received notice of the bar date for filing claims. The decedent's estate, of which this widow was the executrix, attempted after the bar date to file a proof of claim reflecting a wrongful death claim. It was undisputed that the estate itself was never given notice of the bar

date.

In denying the estate's motion for leave to file its proof of claim late, the Bankruptcy Court for the Northern District of Ohio distinguished City of New York, supra, and stated in part,

> [The decedent's widow] is correct that the Estate of John Szakmeister never received notice but this ie a technicality without merit. Mrs. Szakmeister is one person. The fact that, in her role as executrix of the Estate of John Szakmeister she did not receive notice, does not change the fact that she did individually receive notice.... Her unexplained failure to [file a wrongful

> death claim before the bar date] is not excused by the fact that a separate notice was not sent to her as executrix.

The appellants' argument in this appeal is that because the Bankruptcy Court did not send to Mr. Berlin a notice stating the bar date which was in exactly the same words as the other three notices received by Mr. Berlin, except addressed to Ft. Oglethorpe instead of to one of the other three appellants, Ft. Oglethorpe is entitled to disregard the bar date of which its representative, Mr. Berlin, had notice. To read the due process requirement to do nothing more than to require one more piece of paper repeating what is contained in three other pieces of paper would elevate form over substance. The Court is not

convinced that due process requires this, and so will affirm Judge Stair's denial of the motion for leave to file proofs of claim after the bar date with respect to all four appellants.

ENTER:

Leon Jordan

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

FILED
SEP 12, 1990

In re: PIONEER INVESTMENT SERVICES COMPANY, Debtor-in-Possession. BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, et al., Appellants, v. PIONEER INVESTMENT SERVICES COMPANY, Appellee.	)	No.CIV-3-90-0666
BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, et al., Appellants, v. PIONEER INVESTMENT SERVICES COMPANY Appellee.	)	NO. CIV-3-90-_____

ORDER

For the reasons stated in the Court's Memorandum Opinion filed simultaneously with this Order, the Court's previous order consolidating these two cases on appeal [doc. 6 in No. CIV 3-90-0666] is SET ASIDE. The Court will decide the issue on appeal in No. CIV 3-90-____ separately.

In No., CIV 3-90-0666, the Court rules that the Order entered by the United States Bankruptcy Court for the Eastern District of Tennessee on June 8, 1990, denying the appellants' motion for leave to file their proofs of claim after the bar date, is AFFIRMED. Bankruptcy Rule 8013.

ENTER:

Leon Jordan

United States District Judge

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 3-89-01058

PIONEER INVESTMENT SERVICES
COMPANY a/k/a PREMIERE RESTAURANT
INVESTMENT COMPANY

Debtor

O R D E R

Upon reconsideration of the motion filed August 23, 1989, by Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership' and Ft. Oglethorpe Associates Limited Partnership in the manner directed by the district court in its Order filed February 20, 1990, remanding these proceedings to the Bankruptcy Court, and for the reasons set forth in this court's Memorandum

Opinion filed October 10, 1989, as supplemented by findings announced orally in open Court on June 8, 1990, the court reaffirms its order entered October 10, 1989. It is accordingly ORDERED that the motion of Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership, and Ft. Oglethorpe Associates Limited Partnership seeking an order extending the August 3, 1989 claims bar date or, alternatively, requesting an order authorizing the filing of these claims shall be and is DENIED.

ENTER: June 8, 1990

BY THE COURT

RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE

MEMORANDUM OPINION

June 8, 1990

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

IN RE :

PIONEER INVESTMENT SERVICES CO.,
A/K/A PREMIERE RESTAURANT
INVESTMENT COMPANY,

Debtor.
Case No. 3-89-01058

BEFORE THE HONORABLE RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

FOR THE DEBTOR:

CRAIG J. DONALDSON, ESQ.
Suite 1200
One Commerce Plaza
Nashville, Tennessee 33239

FOR FIRST NATIONAL BANK OF LOUISVILLE:

R. THOMAS STINNETT, ESQ.
700 First American Center
Knoxville, Tennessee 37902

FOR PAUL D. POWSNER:

CELESTE N. HERBERT, ESQ.
Suite 600
First Tennessee Bank Building
Knoxville, Tennessee 33902

FOR BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP:

JOHN A LUCAS, ESQ.
HOWARD E. FRASIER, JR., ESQ.
7th Floor, First Tennessee Bank Building
Knoxville, Tennessee 37902

FOR BANQUE WORMS:

M. EDWARD OWENS, JR., ESQ.
5 th floor, One Centre Square
620 Market Street
Knoxville, Tennessee 37902

FOR THE UNITED STATES TRUSTEE:

PATRICIA C . FOSTER, ESQ.
Suite 610, Plaza Tower
Knoxville, Tennessee 37929

FOR THE UNSECURED CREDITORS' COMMITTEE:

JOHN A. WALKER, JR., ESQ.
715 First American Center
Knoxville, Tennessee 37902

THE COURT: On October 10, 1989, I entered an order supported by a Memorandum Opinion denying a motion filed August 23, 1989 by Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership, and Fort Oglethorpe Associates Limited Partnership. The partnerships' motion seeks an order extending the August 3, 1989 bar date for filing proofs of claim to August 23, 1989, the date each partnership filed a proof of claim or, alternatively, requests an order authorizing the filing of each claim nunc pro tunc to the claims' bar date.

In my October 10, 1989 memorandum opinion, I relied on In re South Atlantic Financial Corporation, 767 F.2d 814, a 1985 case out of the Eleventh Circuit, and other authorities in applying a definition of

excusable neglect under Bankruptcy Rule 9006 (b) (1) which required a showing that the failure to perform a duty timely, in this instance the filing of the partnerships' proofs of claim, was due to circumstances beyond the reasonable control of the person charged with the duty. In my findings, I relied upon Sherrod v. Piedmont Aviation, Inc., 516 F. Supp. 39 at Page 41, Note 1, a 1978 District Court decision out of this district, in which Judge Neese, in construing Federal Rule of Civil Procedure 6(b), the federal rule upon which Bankruptcy Rule 9006 (b) (1) is patterned, held that excusable neglect is not shown when the failure to act is due to simple inadvertence on the part of counsel, or counsel's mistake regarding the content of the rules, or counsel's lack of familiarity with the rules. The partnership appealed my disallowing their claim.

The District Court in a memorandum opinion filed February 20, 1990 held that the findings of fact contained in my October 10, 1989 memorandum opinion were not clearly erroneous and would not be set aside. However, the District Court held that I construed the excusable neglect standard of Bankruptcy Rule 9006 (b) (1) too narrowly. Judge Jordan remanded with instructions that I reconsider the excusable neglect associated with the late filing of the partnerships' claims within the context of the liberal excusable neglect standard enunciated by the Ninth Circuit Bankruptcy Appellate Panel in In re Dix, 95 B.R. 134, a 1988 case. In Dix, the material facts were that a creditor moved to extend time to file a proof of claim two years after expiration of the bar date. The Court found that the debtor had not listed the creditor in the schedules accompanying its chapter 11 petition and

that the creditor had not known of his claim at the time of the bar date, but did learn of it about a year before he filed his motion for extension of time.

The Ninth Circuit Bankruptcy Appellate Panel, applying a liberal standard, found that the creditor had established excusable neglect. In addition, the Court listed five factors to be considered in determining whether a creditor has satisfied the excusable neglect standard under Bankruptcy Rule 9006 (b) (1). These factors are : "(1) whether granting the delay will prejudice the debtor; (2) the length of the delay and its impact on efficient court administration; (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform; (4) whether the creditor acted in good faith and (5) whether clients should be penalized for their counsel's

mistake or neglect." 95 B.R. at 138, quoting In re Magouirk, 693 F2d 948 at 951, a 1982 decision out of the United States Court of Appeals for the Ninth Circuit.

In addition to his instructions to apply the Dix excusable neglect standard, Judge Jordan in his February 20, 1990 memorandum opinion stated that "the Bankruptcy Court in applying Bankruptcy Rule 9006 (b) should find whether a failure to file a proof of claim on or before a bar date resulted from negligence, indifference or culpable conduct on the part of a moving creditor or its counsel." That quote is contained at Page 10 of Judge Jordan's February 20, 1990 memorandum opinion. He cites INVST Financial Group, Incorporated v. Chem-Nuclear Systems, Inc., 815 F2d 391 at 397 to 400 , a 1987 Sixth Circuit case, and In re Winner Corporation, 632 F.2d 658 at 660 and 61, a 1980 Sixth Circuit case in

support of those instructions.

In its instructions to this Court, the District Court stated : "It will be unnecessary for the Bankruptcy Court to make findings of fact concerning the length of the appellants' delay, whether the delay was beyond the reasonable control of the person whose duty it was to perform, whether the appellants should be penalized for their counsel's mistake or neglect, and whether the failure to file proofs of claim on or before the bar date resulted from negligence, since the Bankruptcy Court's findings of fact in Judge Stair's memorandum opinion address these issues either explicitly or implicitly." That quote is likewise found at Page 10 of Judge Jordan's memorandum opinion.

In sum, this Court, in compliance with the directives of the District Court,

is required to analyze the record before it within the context of the liberal excusable neglect standard set forth in Dix. Of the five factors enunciated by the Dix Court, findings were made in my October 10, 1990 memorandum opinion with respect to factor No. 2, as concerns the length of delay; factor No. 3, concerning whether the delay was beyond the reasonable control of the person whose duty it was to perform; and factor No. 5, relative to whether the partnerships should be penalized for their counsel's mistake or neglect.

Further, in my October 10, 1989 memorandum opinion, I also made specific findings relative to the negligence of the partnerships and their former counsel in failing to file proofs of claims prior to the August 3, 1989 bar date. I will proceed to consider the excusable neglect issue before me as it relates to the late-

filed claims of the partnerships in the manner directed by the District Court. As further instructed by the District Court, I will rely on my findings set forth in my October 10, 1989 memorandum opinion, except where additional findings are appropriate or required relative to Dix factors 1, 2, in part, and 4. My earlier findings, for the most part, will not be restated. Each of the Dix factors will be analyzed separately.

Factor No. 1: Whether granting the delay will prejudice the debtor.

With regard to the issue of prejudice, the debtor contends that if the partnerships are allowed to file their claims, it will be required to object to those claims and to engage in further and expensive litigation in defending against the claims. This argument is unpersuasive.

The allowance of the partnerships' claims would impose no duty upon the debtor beyond that which already exists. Bankruptcy Code ss 1107, with certain limitations, confers upon a debtor in possession the functions and duties imposed upon a trustee appointed in a Chapter 11 case under Bankruptcy Code ss 1106. One of these duties is to examine proofs of claims and object to the allowance of any proof of claim that is improper. See Bankruptcy Code ss 1106(a)(1).

Further, the Court takes judicial notice of the fact that the debtor's second amended plan of reorganization filed March 23, 1990, which is presently under consideration by creditors, proposes to deal with the partnerships' claims, to the extent allowed, as a Class 16 creditor. The debtor's second amended disclosure statement filed March 27, 1990, at Pages 54,

through 57 and 71, discusses the debtor's treatment of the partnerships' claims. The debtor will not be prejudiced by granting the filing of the partnerships' motion beyond the August 3, 1989 bar date. Factor No. 1 is resolved in favor of the partnerships.

Factor No. 2: The length of the delay and its impact on efficient court administration.

The bar date for filing claims was August 3, 1989. The partnerships filed their claim on August 23, 1989, 20 days beyond the bar date. Other than the time associated with litigating the partnerships' motion in the instant proceeding, the delay has had no adverse or negative impact on efficient court administration. The debtor has proceeded with the reorganization process to the

extent that an order approving the adequacy of its second amended disclosure statement was entered April 4, 1990. The solicitation process has begun and, as I have discussed, the debtor's second amended plan of reorganization is before its creditors and interest holders. This plan takes the partnerships' claims into account to the extent the respective claims may be allowed. Factor No. 2 is resolved in favor of the partnerships.

Factor No. 3: Whether the delay was beyond the reasonable control of the person whose duty it was to perform.

The court need not reiterate its findings made October 10, 1989 wherein it determined that it could not "on the record before it . . . find that the failure of the partnerships to file claims prior to expiration of the bar date were due to

circumstances . . . beyond [their] reasonable control." The Court's October 10, 1989 memorandum opinion clearly delineates its findings supporting this conclusion. The 20-day delay in filing the partnerships' claims was not beyond the reasonable control of the partnerships and/or their former attorney, Marc Richards. Factor No. 3 is resolved against the partnerships.

Factor No. 4: Whether the creditors acted in good faith.

There's nothing in the record to suggest that the partnerships or their former attorney, Marc Richards, acted other than in good faith in the filing of the partnerships' claims. Factor No. 4 is resolved in favor of the partnerships.

Factor No. 5: Whether clients

should be penalized for their counsel's mistake or neglect.

The Court made specific findings in its October 10 , 1989 memorandum opinion relating to the circumstances surrounding the late filing of the partnerships' claims. The Court observes that the Ninth Circuit Bankruptcy Appellate Panel in Dix was also confronted with a motion filed by a creditor after expiration of the claims' bar date requesting an extension of time in which to file a proof of claim. The Dix court premised its conclusion that it would be improper to penalize the creditor for its attorney's neglect exclusively on its assumption that the attorney "did not sufficiently advise the creditor of his rights and duties as a creditor of the Dix estate." See 95 B.R. at 139.

The Dix Court made no further

findings in support of its resolution of Factor No. 5 in favor of the creditor. In the instant proceeding, his Court cannot ignore the fact that Mark Berlin, President of Pudding Enterprises, Inc., the general partner of Fort Oglethorpe, and the President of Robriste Enterprises, Inc., the general partner of Clinton, West Knoxville and Brunswick, testified that he read the notice contained in the August 3, 1989 bar date upon receipt.

As I noted in my October 10, 1989 memorandum opinion, Mr. Berlin is not an unsophisticated individual when it comes to financial matters. He is engaged in the business of real estate and financial management, he is an attorney licensed to practice law in the states of Florida and New York, and he is a certified public accountant. Additionally, he is the President of the two general partners who

manage Clinton, West Knoxville, Brunswick, and Fort Oglethorpe, creditors who assert claims against the debtor in excess of $6,900,000.

This court cannot disregard the fact that Mr. Berlin and, therefore, the partnerships had actual knowledge of the August 3, 1989 claims' bar date shortly after the debtor filed its Chapter 11 petition. Under the circumstances of the instant proceeding, resolution of Factor No. 5 in the partnerships' favor would equate to a finding that notice of a claim's bar date served on a creditor, regardless of the degree of sophistication of that creditor' is ineffective where the creditor subsequently employs counsel. While it is true that the ultimate responsibility for filing the partnerships' proofs of claims falls on Mr. Richards' shoulders, the Court cannot disregard the

fact that the partnerships through Mr. Berlin were aware of the claims' bar date shortly after commencement of the bankruptcy case.

Further, Mr. Berlin has been an active participant in the debtor's Chapter 11 case, having participated in the initial and adjourned meetings of creditors, and he has been a member of the committee of Unsecured Creditors from its inception. Actual knowledge of the claims' bar date by Mr. Berlin and, therefore, the partnerships, precludes the court from finding that it would be improper to penalize the partnerships for the neglect of their attorney. The partnerships and their attorney all had actual knowledge of the August 3, 1989 claims' bar date. Factor No. 5 is resolved against the partnerships.

Did failure of the partnerships to

file a proof of claim on or before the August 3, 1989 bar date result from negligence, indifference, or culpable conduct on the part of the creditor or its counsel? Again, I made specific findings in my October 10, 1989 memorandum opinion relating to the circumstances surrounding the August 23, 1989 filing of the partnerships' proofs of claim. Those findings support the conclusion that Mr. Richards was negligent in not timely filing proofs of claims on behalf of the partnerships. To a degree, they also support the conclusion that Mr. Richards' attitude toward the bar date was one of indifference. They do not support a finding of culpable conduct on the part of the partnerships or their former counsel.

The court concludes that Factors No. 1, 2, and 4 of the Dix standard of excusable neglect, when isolated, must be

resolved in favor of the partnerships. Factors No. 3 and 5 must be resolved against the partnerships. In weighing the relative importance of each of the various factors, the Court is persuaded that under the facts of the instant proceeding Factors No. 3 and 5 must be accorded more weight than Factors No. 1, 2, and 4. Factors No. 3 and 5 go to the procedural heart of the claims' filing process -- notice. For this court to hold that the partnerships' late-filed claims are to be allowed as timely filed, notwithstanding that both the partnerships and their attorney had actual knowledge of the August 3, 1989 claims' bar date and ample time to file proofs of claim, would render nugatory the fixing of the claims' bar date in this case.

Under the extreme facts of this case, a finding that the partnerships' claims should be allowed as timely filed

would establish a precedent difficult to overcome in Chapter 11 and chapter 7 asset cases. The Chapter 11 debtor should be secure in the knowledge that the creditor holding a disputed, contingent, or unliquidated claim, who has received notice of the bar date for filing proofs of claim is required to comply with the procedural claims' filing process mandated by Bankruptcy Rule 3003(c).

Whereas, under the facts of this case the court attaches considerable importance to Dix factors 3 and 5, it attaches less importance to Factors No. 1, 2, and 4. The Court routinely fixed the August 3, 1989 claims' bar date at 90 days after the initial meeting of creditors required under Bankruptcy Code ss 341(a). On August 3, 1989, less than 120 days had elapsed since the filing of the debtor's petition. As is true in many large

Chapter 11 cases, the reorganization process at this time remained in a relative stage of infancy. It's difficult to envision circumstances where Factors No. 1 and 2, standing by themselves, would have been resolved against any creditor in the instant case holding a disputed, contingent, or unliquidated claim who sought to file a proof of claim within reasonable time after expiration of the bar date. Rarely is a delay of a few days in the filing of a claim after expiration of the bar date in a chapter 11 case, when considered by itself, going to prejudice the debtor or impact on efficient court administration. Rarely is a creditor's good faith, and the Dix court does not provide a definition of that term within the context of a late-filed claim, going to be seriously at issue with respect to a claim filed shortly after expiration of the bar date.

Certainly Factors No. 1, 2, and 4 must be considered within the context of each case. The longer the delay, the more critical these factors may become. Notice, however, goes to the very substance of the claims' filing process. The facts supporting the Ninth Circuit Bankruptcy Appellate Panel's allowance of the late-filed claim in Dix are dissimilar with the facts confronting this Court in the instant proceeding. The dissimilarity is focused on the creditors' knowledge of the existence of the claims' bar date. In Dix, the creditor was not scheduled by the debtor and was unaware of his claim prior to the expiration of the bar date. In the case before me, the partnerships, excepting Fort Oglethorpe, were scheduled by the debtor and all four partnerships, together with their former attorney, had actual knowledge of the August 3, 1989 bar date.

On balance, when considered within the context of the actual notice of the partnerships and their attorney of the claims' bar date, the relative importance of Dix Factors No. 3 and 5 clearly outweighs the importance of Factors No. 1, 2, and 4. The notice factor is pervasive in analyzing these five factors and it is very difficult to isolate the factors out and treat them separately, a problem the Dix court was not confronted with because there wasn't any notice.

It's my conclusion that the partnerships have not established excusable neglect under the standard this Court was directed to follow under the order of remand filed by the District court on February 20, 1990. My order denying the partnerships' motion entered October 10, 1989 will be reaffirmed.

This Memorandum Opinion supplements the Memorandum Opinion previously filed October 10, 1989. An appropriate order will be entered. In the event of the transcription of this opinion, the court reporter will deliver it to me, I will make such amendments and changes as I deem appropriate. I will put down an appropriate order memorializing this opinion.

FILED: June 20, 1990, nunc pro tunc to June 8, 1990

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

FILED
FEB 20, 1990

In re PIONEER INVESTMENT SERVICES COMPANY, Debtor.	)
BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP. et al.' Appellants,	)
v.	)
	No. CIV 3-89-0927
PIONEER INVESTMENT SERVICES COMPANY, Appellee.	)

MEMORANDUM OPINION

The issue on appeal in this case is whether the Bankruptcy Court erred in holding that the four appellants were barred from filing Proofs of claim in the debtor's reorganization case in bankruptcy because they missed the filing deadline,

the "bar date". The four appellants are limited partnerships, Brunswick Associates Limited Partnership ("Brunswick"), Clinton Associates Limited Partnership ("Clinton"), Ft. Oglethorpe Associates Limited Partnership ("Ft. Oglethorpe"), and West Knoxville Associates Limited Partnership ("West Knoxville"). The appellee is the debtor, Pioneer Investment Services Company ("PISCO"). United States Bankruptcy Judge Richard Stair, Jr. denied the relief sought by the appellants in a thoughtful memorandum opinion filed October 10, 1989, which appears as item No. 9 in the record on appeal. Judge Stair's findings of fact are not clearly erroneous, and therefore may not be set aside. Bankruptcy Rule 8013. Counsel for the parties agreed at oral argument before this Court that there are no factual issues presented in this appeal.

The facts reveal the following chronology. On April 12, 1989, the debtor filed its petition for relief, On April 13. the Bankruptcy Court Clerk issued a notice of the 11 U.S.C. ss 341 meeting of creditors. This notice included the following statement:

> You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 USC Sec. 1111 & Bankruptcy Rule 3003.
> Bar date is August 3, 1989.

Three of the appellants received this notice, Ft. Oglethorpe was not sent one. The three notices were all received by Mark A. Berlin.

Mark A. Berlin was at all pertinent times the president of Pudding Enterprises, Inc, the corporate general partner of Ft. Oglethorpe, and the President of Robriste Enterprises, Inc., the corporate general Partner of the other three appellants. He attended the creditors' meeting on May 19, 1989. When the Assistant United States Trustee asked for appearances to be stated on the record, Mr. Berlin stated his name, and listed all four of the appellants. During the meeting, Mr, Berlin referred to himself as the general partner of several of these partnerships, and stated that, while he is an attorney at law, he was not the attorney for the appellants. Mr. Berlin questioned the debtor's representative, Milton A. Turner, about PISCO's dealings with all four of the appellants, and asked specifically why PISCO had not scheduled Ft. Oglethorpe as a

creditor.

The creditors' meeting was adjourned until June 19, 1989. Mr. Berlin attended this meeting, too, with Marc E. Richards, Esq. of the New York, New York law firm of Myerson & Kuhn. Mr. Richards announced that he was appearing for the appellant Clinton. On June 19, 1989, Mr. Richards filed a written notice of appearance on behalf of Clinton. However, as Judge Stair found, affidavits signed by Mr. Berlin and Mr. Richards show that Mr. Richards represented all four of the appellants in the Bankruptcy Court. Counsel for the appellants conceded at oral argument before this Court that Mr. Richards represented all of the appellants in the Bankruptcy Court.

Concerning Mr. Richards' representation of the four appellants.

Judge Stair quoted from an affidavit made by Mr. Berlin:

> [T]he Partnerships retained Mr, Richards as bankruptcy counsel in mid-June, 1989. At that time, I had [the] Partnerships' bankruptcy file reproduced and given to Mr. Richards, I also inquired as to the time for filing the Partnerships' Proofs of claim, Richards advised me that as there was no bar date, that the filing of the Partnerships' proofs of claim was not a matter of urgency.

Some time after the appellants retained him, Mr. Richards left Myerson & Kuhn to practice with another law firm, and for a time was unable to gain possession of his file concerning this representation. However, there is no evidence that he asked

Mr, Berlin for the duplicate file during this period.

The appellants did not file Proofs of claim by the August 3, 1989 bar date, even though the debtor's amended schedules do not list Ft. Oglethorpe as a creditor, and list the claims of the other three appellants as contingent, unliquidated, and disputed. On August 23, 1989, all four appellants, by Mr. Richards as their attorney, moved for an extension of time within which to file proofs of claim, or, in the alternative, to allow the filing of their proofs of claim nunc pro tunc, Mr. Berlin and Mr. Richards submitted affidavits in support of this motion, and the appellants' proofs of claim were proffered with the motion. Judge Stair's denial of this motion led to this appeal.

The appellants make four arguments

why Judge Stair's decision should be overturned. First, they argue that Judge Stair erred as a matter of law when he held that a motion for an extension of time within which to file proofs of claim filed after a bar date set by the Bankruptcy Court is governed by both the "for cause shown" language of Bankruptcy Rule 3003(c)(3), and by Bankruptcy Rule 9006(b)(1), which provides in pertinent part, " [W]hen an act is required or allowed to be done at or within a specified period. . . by order of court, the court for cause shown may at any time in its discretion. . . on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect."

Second, the appellants argue that if Rule 9008(b)(1)'s excusable neglect standard does apply, the Bankruptcy Court

erred in construing the phrase too strictly, to require a showing that the appellants' failure to file their proofs of claim on or before the bar date was due to circumstances beyond the reasonable control of the appellants or their attorney. The appellants say that this "beyond reasonable control" construction reads the word "neglect" out of the rule, since one cannot truly be said to have neglected to do what was beyond one's ability to do.

Third, the appellants argue that, no matter what the proper legal standard for considering a late motion to extend the time for filing Proofs of claim, Judge Stair abused his discretion in not allowing the extension of time or the filing nunc pro tunc under the circumstances. Fourth, Ft. Oglethorpe argues that barring its claim against PISCO in spite of the fact that no notice of the 11 U.S.C. ss 341

meeting of creditors was mailed to it denies it due process.

The appellants' first, second, and fourth arguments ask this Court to determine whether the Bankruptcy Court erred in its conclusions of law, which requires de novo consideration of these conclusions. Matter of Consolidated Bancshares, Inc., 785 F.2d 1249, 1252 (5th Cir. 1986) (citation omitted). The appellants' third argument asks this Court, after determining the rules of law properly to be applied, to determine whether Judge Stair abused his discretion in applying these rules to the facts.

This Court is convinced that Judge Stair did not err in concluding that Bankruptcy Rules 3003(c)(3) and 9006(b) must be read together in considering a motion to extend the time for filing

Proofs of claim filed after the bar date set in a chapter 11 case. In re Vertientes, 845 F.2d 57, 59, 60 (3rd Cir. 1988), and In re South Atlantic Financial Corp., 767 F.2d 814, 817 (11th Cir. 1985), cert. denied, sub nom. Biscayne 21 Condominium, Inc. v. South Atlantic Financial Corp., 475 U.S. 1015 (1986). See also Matter of Robintech, Inc. 863 F.2d 393, 297 n.2 (5th Cir.), cert. denied, sub nom. Bullock v. Oppenheim, Appel, Dixon & Co., ____ U.S. ____ [110 S. Ct. 55] (1989) (citation omitted) ("The [creditor] also could have, but failed to, ask for an extension after the bar date passed, based upon excusable neglect.") Rule 9006(b)(1) is the more specific rule, since it applies expressly to any motion for an extension of time filed "after the expiration of the specified period".

The Court of Appeals for this Circuit

has not had occasion to address this issue. However, the approach taken by Judge Stair is consistent with the practice under the former rules. See In re Yoder Company, 758 F.2d 1114, 1117-18 (6th Cir. 1985) (whether a creditor's claim was barred for late filing of his proof of claim considered under the Bankruptcy Rule 906(b) standard of excusable neglect). Many courts, including bankruptcy courts, district courts, and a bankruptcy appellate panel, have come to the same conclusion as did Judge Stair. See, for example, In re Dix, 95 Bankr. 134 (B.A.P. 9th Cir, 1988); Mackie v. Production Oil Co., 100 Bankr. 826 (N.D. Tex. 1988); In re STN Enterprises, Inc., 99 Bankr. 218 (D. Vt. 1988); In re Wolray Hotels, Inc. 99 Bankr. 480 (Bankr. M.D. Fla. 1989); and In re Jackson, 98 Bankr. 738 (Bankr. D. Md. 1986).

The question of the definition of "excusable neglect" for the purposes of the rule is precisely the one left unanswered by the Court of Appeals for this Circuit in In re Yoder Company, 758 F.2d 1114, 1117-18 and n.4 (6th Cir. 1985). Judge Stair, relying on In re South Atlantic Financial Corp., 767 F.2d 814 (11th Cir. 1985), cert. denied, sub nom. Biscayne Condominium Association, Inc. v. South Atlantic Financial Corp., 475 U.S. 1015 (1986), and other authorities, applied the definition of excusable neglect which requires a showing that the failure to perform timely a duty was due to circumstances beyond the reasonable control of the person charged with the duty. Judge Stair also relied upon Sherrod v. Piedmont Aviation, Inc., 516 F. Supp. 39, 41 n.1 (E.D. Tenn. 1978) (citation omitted), in which District Judge Neese, construing the similar provision in Fed. R. Civ. P. 6(b)(2), held that

excusable neglect is not shown when the failure to perform the duty was due to simple inadvertence on the part of counsel, or to counsel's mistake regarding the applicable procedural rules, or to counsel's unfamiliarity with the rules.

While there is respectable authority for the narrow reading of "excusable neglect", this Court believes that the Court of Appeals for this Circuit will require a more liberal approach to construing and applying the rule. In INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F.2d 391, 397-400 (6th Cir.), cert. denied, sub nom. Garratt v. INVST Financial Group, Inc., 484 U.S. 927 (1987), the Court indicated that consideration of a Fed. R. Civ. P. 60(b) motion to set aside a default judgment requires consideration of whether the plaintiff will be prejudiced by the

granting of the motion, of whether the moving defendant has stated a meritorious defense, and of whether culpable conduct on the part of the defendant led to the default sought to be set aside. In In re Winner Corporation, 632 F.2d 658,660-61 (6th Cir. 1980), the Court reversed a district court's dismissal of a bankruptcy appeal, holding that the late filing of the designation of the record on appeal under former Bankruptcy Rule 806 would not justify dismissal of the appeal in the absence of a finding of negligence or indifference on the part of the appellant, and at least implying that a finding of bad faith is necessary to support such a dismissal.

This Court understands the importance of claims-filing deadlines in chapter 11 cases, and perceives that this importance might justify treating motions

for extensions like the one presented to the Bankruptcy Court by the appellants less generously than a Fed. R. Civ. P. 60(b) motion or a motion to extend a deadline set by Bankruptcy Rule 8006.

> The purpose of the bankruptcy laws is quickly and effectively to settle bankrupt estates... [B]ecause [bankruptcy] procedures are thought to be necessary to protect the bankrupt and the creditors, exceptions cannot be made every time a creditor claims hardship. . . . Frequent players in the bankruptcy arena. . . know this and are aware that deadlines are important and should not be heard to complain of unfairness except

> under the most egregious circumstances.

Matter of Robintech, Inc., 863 F.2d 393, 397-98 (5th Cir.), cert. denied, sub nom. Bullock v. Oppenheim, Appel, Dixon & Co., ___ U.S. __ [110 S. Ct. 55] (1989) (citations omitted). Nevertheless, this Court believes that the Court of Appeals, if and when confronted with this issue, will require the lower courts to read the "excusable neglect" rule more liberally than the "beyond-reasonable-control" reading.

This Court believes that the five factors listed in In re Dix, 95 Bankr. 134, ___ (B.A.P. 9th Cir. 1988) (citation omitted), are applied appropriately in cases like this to determine whether a creditor has satisfied the Bankruptcy Rule 9006(b) requirement of a showing of

excusable neglect:

(1) whether granting the delay will prejudice the debtor;

(2) the length of the delay and its impact on efficient court administration;

(3) whether the delay was beyond the reasonable control of the person whose duty it was to perform;

(4) whether the creditor acted in good faith; and

(5) whether clients should be penalized for their counsel's mistake or neglect.

In addition, following INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F.2d 391, 3970400 (6th Cir.), cert. denied, sub nom. Garratt v. INVST Financial Group, Inc., 484 U.S. 927

(1987), and In re Winner Corporation, 632 F.2d 658, 660-61 (6th Cir. 1980), the Bankruptcy Court in applying Bankruptcy Rule 9006(b) should find whether a failure to file a proof of claim on or before a bar date resulted from negligence, indifference or culpable conduct on the part of a moving creditor or its counsel.

This Court will therefore remand this case to the Bankruptcy Court for reconsideration of the appellants' motion against these factors. It will be unnecessary for the Bankruptcy Court to make findings of fact concerning the length of the appellants' delay, whether the delay was beyond the reasonable control of the person whose duty it was to perform, whether the appellants should be penalized for their counsel's mistake or neglect, and whether the failure to file proofs of claim on or before the bar date resulted from

negligence, since the Bankruptcy Court's findings of fact in Judge Stair's memorandum opinion address these issues either explicitly or implicitly. Furthermore, it will be for the Bankruptcy Court to determine how to weigh the relative importance of the various factors in this particular case and in other cases, since the determination of the presence or absence of excusable neglect under Bankruptcy Rule 9006(b) must be made case by case.

This disposition of this appeal makes it unnecessary or at least premature to decide whether Judge Stair abused his discretion in denying the appellants' motion. Since it is possible that reconsideration of the motion will lead to the granting of some or all of the relief sought, this Court will not address the due process issue raised by Ft. Oglethorpe,

in light of the familiar rule concerning the avoidance of constitutional issues not necessary to a judicial decision. Once the Bankruptcy Court has reconsidered the appellants' motion under the criteria stated in this opinion, the parties will have an opportunity to appeal again to this Court. However, the Court cautions the parties and their counsel that, the legal issues having been decided, any decision by the Bankruptcy Court to grant or to deny the appellants' motion will stand unless an abuse of discretion is shown. In re Vertientes, Ltd., 845 F.2d 57, 59 (3rd Cir. 1988). "Whether or not to extend a bar date is a matter within the sound

discretion of the bankruptcy court and such a decision will not be set aside absent an abuse of discretion." In re Dix, 95 Bankr. 134, ___ (B.A.P. 9th Cir. 1988) (citations omitted).

ENTER:

Leon Jordan

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

FILED
FEB 20,1990

In re PIONEER INVESTMENT SERVICES COMPANY, Debtor.	)
BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP. et al., Appellants,	)
v.	)
	No. CIV 3-85-0927
PIONEER INVESTMENT SERVICES COMPANY, Appellee.	)

O R D E R

For the reasons stated in the Court's Memorandum Opinion filed simultaneously with this Order, the decision of the United States Bankruptcy

Court for the Eastern District of Tennessee denying the appellants' motion for an extension of time within which to file their proofs of claim in this case in bankruptcy is AFFIRMED IN PART and DENIED IN PART. These proceedings are REMANDED to the Bankruptcy Court for reconsideration of the appellants' motion in accordance with the instructions stated in this Court's Memorandum Opinion.

ENTER:

Leon Jordan
United States District Judge

APPENDIX E

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE

In re

Case No, 3-89-01058

PIONEER INVESTMENT SERVICES
COMPANY a/k/a PREMIERE
RESTAURANT INVESTMENT COMPANY

Debtor

MEMORANDUM ON MOTION TO EXTEND TIME TO
FILE PROOFS OF CLAIM OR TO ALLOW FILING
OF PROOFS OF CLAIM NUNC PRO TUNC

APPEARANCES: Milgrim, Thomajon & Lee, P.C.
Marc E. Richards, Esq.
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Attorneys for Clinton
Associates Limited
Partnership, West Knoxville
Associates Limited
Partnership, Brunswick
Associates Limited
Partnership, and Ft.
Oglethorpe Associates Limited
Partnership

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P.O. Box 2774
Knoxville, TN 37901
Attorneys for Committee of
Unsecured Creditors

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

The court has before it a motion filed August 23, 1989, by four unsecured creditors, Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership, and Ft. Oglethorpe Associates Limited Partnership (Clinton, West Knoxville, Brunswick, and Ft. Oglethorpe or, collectively, the Partnerships). By their motion, the Partnerships seek an order extending the bar date for filing proofs of Claim. Alternatively, the Partnerships request the court to allow the filing of their claims nunc pro tunc as of the claims bar date. The debtor opposes the relief sought by the Partnerships. The committee of unsecured creditors advised the court by a letter from its counsel received September 19, 1989, that it takes no position on the motion.

In its resolution of the issues, the court has considered supporting affidavits filed by the Partnerships together with oral testimony introduced at a hearing held September 14, 1989.[1] Additionally, the Court takes judicial notice of material facts of record in the debtor's bankruptcy case file.

This is a core proceeding. 28 U.S.C.A. ss 157(b)(2)(A) and (O) (West Supp. 1989).

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[1] Fed. R. Civ. P. 43, incorporated into ed. R. Bankr. P. 9017, provides in material part:

> (e) Evidence on Motions. When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

The debtor filed its voluntary petition under Chapter 11 of title 11 of the United States Code on April 12, 1989. Contemporaneously therewith it filed a list of its twenty largest unsecured creditors. Included within this list are Clinton, West Knoxville, and Brunswick. The debtor requested and was granted extensions through May 17, 1989, within which to file its statement of affairs and schedules.

On April 13, 1989, a Notice For Meeting Of Creditors (Notice) was mailed by the clerk's office to parties in interest fixing My 5, 1989, as the date for the creditors' meeting required under Bankruptcy ss 341(a). This Notice also fixed August 3, 1989, as the bar date for filing proofs of claim. Concerning the

claims bar date, the Notice provides:

> You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 USC Sec 1111 Bankruptcy rule 3003.
> Bar date is August 3, 1989.

Mark A. Berlin, president of Robriste Enterprises, Inc., general partner of Clinton, West Knoxville and Brunswick, and president of Pudding Enterprises, Inc., general partner of Ft. Oglethorpe, received and read the April 13, 1989 Notice.[2] The

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[2] Mr. Berlin is engaged in the business of real estate and financial management. He is an attorney licensed to practice in Florida and New York and is

Partnerships do not dispute the timely receipt of the Notice by Mr. Berlin nor do they dispute that Clinton, West Knoxville, and Brunswick had notice of the filing of the debtor's Chapter 11 petition. Ft. Oglethorpe, however, contends that it did not receive the April 13, 1989 Notice and that it did not, therefore, have notice of the August 3, 1989 claims bar date.

Mr. Berlin attended and participated in the May 5, 1989 meeting of creditors.[3]

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also a certified public accountant. He testified that he read the Notice upon receipt, but that he has no familiarity with bankruptcy law.

[3] The record is unclear as to whether the May 5, 1989 meeting of creditors was ever held. A "Notice of Rescheduling Of Meeting Of Creditors" dated May 3, 1989, was filed by the debtor's attorneys on May 5, 1989. This notice reflects a rescheduling of the May 5 meeting to May

He also attended adjourned meetings of creditors held May 19 and June 16, 1989. The Proceeding Memo filed by the United

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19, 1989. However, Mr. Berlin in an affidavit accompanying the Partnerships' motion states:

> I attended the first scheduled 341(a) meeting in Knoxville on May 5. I participated in the examination of the debtor and noted for the record, along with the U.S. Trustee, the futility of continuing the Debtor's examination in light of the incompleteness of the debtor's schedules and statement of affairs.... The Section 341(a) meeting was adjourned by the U.S. trustee until June 16, 1989.

Although the United States Trustee did not file a Proceeding Memo evidencing the conduct of a meeting of creditors on may 5, 1989, the court concludes from Mr. Berlin's affidavit that a meeting was held.

States Trustee subsequent to the May 19, 1989 creditors meeting evidences that Mr. Berlin entered an appearance in behalf of each of the Partnerships. The June 16, 1989 adjourned meeting was attended by Mr. Berlin and the Partnerships' attorney, Marc Richards.[4]

The debtor filed its statement of financial affairs and schedules on May 18, 1989. The Partnerships are not listed on the schedules as originally filed. However,

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[4] According to the Proceeding Memo filed by the United States Trustee, Mr. Richards' appearance at the June 16, 1989 adjourned meeting was entered on behalf of Clinton. Mr. Richards also filed a written "Notice of Appearance And Request To Receive Notices" with the clerk's office on June 19, 1989, confirming his representation of Clinton. Affidavits filed by Berlin and Richards evidence Richards' representation of all four Partnerships.

on May 25, 1989, the debtor amended its schedules to include Clinton, West Knoxville, and Brunswick as creditors holding contingent, unliquidated, and disputed claims. Ft. Oglethorpe is not scheduled as a creditor.

The debtor 's schedules, as amended, list fifteen secured creditors holding claims undisputed in amount $34,290,078.26. Two secured creditors, Paul D. Powsner and Banque Worms, are scheduled as holding contingent, unliquidated, and disputed claims. The debtor does not assign amounts to these disputed claims. Paul D. Powsner filed a claim on Hay 16, 1989, in the amount of $609,000.

The debtor scheduled eighty-two Creditors holding priority and general unsecured claims totalling $9,512,903.89. Twenty-two of these creditors are scheduled

as holding priority claims totalling $508,827.43; sixty creditors are scheduled as holding general unsecured claims totalling $9,004,076.46. Claims of five of the general unsecured creditors, including Clinton, West Knoxville and Brunswick, are unscheduled as to amount and are scheduled by the debtor as contingent, unliquidated, and disputed. Circuit City Stores, Inc., a creditor scheduled as holding a disputed claim, filed a proof of claim on August 2, 1989, in the amount of $2,300,000.

On June 5, 1989, the United States Trustee filed his "Appointment of Committee of Unsecured Creditors" designating, inter alia, Clinton as a member of the creditors' committee. Mr. Berlin, representing Clinton, has served as a member of this committee since its inception.

The Partnerships retained the legal

services of Marc Richards, an experienced bankruptcy practitioner,[5] prior to the June 16, 1989 adjourned meeting of Creditors. Concerning Richards' retention, Mr. Berlin, in his affidavit, states:

> [T]he Partnerships retained Mr. Richards as bankruptcy counsel in mid-June, 1989. At that time, I had [the] Partnerships' bankruptcy file reproduced and given to Mr. Richards. I also inquired as to the timing for filing the Partnerships' proofs of claim. Richards advised me that as there was no bar date, that the filing of the Partnerships' proofs of claim was not a matter of urgency.

Mr. Berlin's testimony at the September 14, 1989 hearing on the Partnerships' motion is consistent with his affidavit and is not disputed by Mr. Richards.

On August 23, 1989, twenty days after expiration of the August 3, 1989 claims bar date, the Partnerships filed their proofs of claim. These claims are signed on behalf of Clinton, West Knoxville, and Brunswick by "Mark A. Berlin, President Robriste Enterprises, Inc. (General Partner)." The claim filed on behalf of Ft. Oglethorpe is signed by "Mark A. Berlin, President Pudding

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[5] Mr. Richards states in his affidavit that he has practiced bankruptcy law for more than seven years and that "I have participated in some of the larger bankruptcy cases across the country including: Baldwin-United, LTV, Braniff Airlines, Tacoma Boat Building, Family Health Plans a/k/a Mexicare Health Plans, DRW Realty, Wilson Foods and Spector Red Ball."

Enterprises, Incorporated (General Partner)." The claims are filed in the following amounts: Clinton - $1,567,650; Brunswick - $2,364,330; West Knoxville - $2,280,831; and Ft. Oglethorpe - $730,322.

The Partnerships acknowledge that their claims were filed beyond the August 3, 1989 bar date. They contend, however, that the bar date should be extended or, alternatively, that their claims filed August 23, 989, should be allowed nunc pro tunc to August 3, 1989.

II

Bankruptcy Code 1111(a) provides:

(a) A proof of claim or

interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated.

11 U.S.C.A ss 1111(a) (West 1979).

Bankruptcy Rule 3003(c) provides in material part:

(c) Filing proof of claim

. . . .

(2) Who must file. - Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest

within the time prescribed by subdivision (c)(3) of this rule: any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

(3) Time for filing. The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed.

Fed. R. Bankr. P. 3003(c).

Bankruptcy Rule 3003(c)(2) mandates the filing of proofs of claim by creditors scheduled by the debtor as holding "disputed, contingent or unliquidated" claims. Rule 3003(c)(3) directs the court to fix a bar date for filing claims, but permits the court to extend the bar date

for "cause shown".

Bankruptcy Rule 3003(c)(3) must be read in conjunction with Bankruptcy Rule 9006(b). Vertientes, Ltd. v. Internor Trade, Inc. (In re Vertientes, Ltd.), 845 F.2d 57,60 (3rd Cir. 1988); Biscayne 21 Condominium Assoc., Inc. v. South Atlantic Financial Corp. (In re South Atlantic Financial Corp.), 767 F.2d 814,817 (11th Cir. 1985); Dix v. Johnson (In re Dix), 95 B.R. 134, 137 (9th Cir. BAP 1988).

Bankruptcy Rule 9006(b)(1) provides:

(b) Enlargement

(1) In General. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by

these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Fed. R. Bankr. P. 9006(b)(1) (emphasis added).

Paragraphs (2) and (3) of Rule 9006(b) refer to Rules under which the court has no discretion to extend time or

can extend it only within the limits imposed in those Rules. Rule 3003 is not within the exceptions provided in these paragraphs. " [U]nder Rule 9006(b)(1) a bankruptcy court does have discretion to extend time to file a proof of claim, but only under the circumstances set forth in the two situations described in the Rule." In re Vertientes, Ltd., 845 F.2d at 59.

The term "excusable neglect" is not defined in the Bankruptcy Code. In In re South Atlantic Financial Corp., the Eleventh Circuit stated:

> Courts have interpreted "excusable neglect" under Rule 9006(b) and its identically worded predecessor, Rule 906(b), as requiring the movant to show that "'the failure to timely perform a duty was due to circumstances

which were beyond the reasonable Control of the person whose duty it was to perform.'" In re Gem Rail Corp., 12 B.R. 929, 931 (Bankr. E.D. Pa. 1981) (quoting In re Manning, 4 B.C.D. 304, 305 (D. Conn. 1978). Thus, in In re Underground Utility Construction Co., 35 B.R. 588 (Bankr. S.D. Fla. 1983), the court held that a creditor had failed to show "excusable neglect" for filing his claim three days after the bar date where the untimely filing was the result of his failure to mail his claim to the proper address. Similarly, in In re Oakton Beach and Tennis Club Real Estate Limited Partnership, 9 B.R. 201 (Bankr.E.D. Wisc. 1981), the court held that counsel's reliance on misinformation from a bankruptcy

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court clerk regarding his duty to file a proof of claim did not amount to excusable neglect; see also In re Horn Construction a& Maintenance, Inc., 32 B.R. 87 (Bankr. S.D. Ala. 1983, ("misunderstanding" between a creditor and its lawyers which caused its late filing of a proof of claim did not amount to "excusable neglect.") In re Gem Rail Corp., 12 B.R. 929,931 (Bankr. E.D. Pa. 1981) (creditor's failure to file timely proof of claim was not excusable neglect where there was no showing by creditor that records could not easily have been obtained). Courts have been most willing to find excusable neglect where the movant failed to comply with the bar date because, through no fault

of its own, it had no notice of that date. See e.g., In re Loveridge, 2 B.C.D. 1957 (Bankr. D. Conn. 1977).

767 F.2d at 817-818.

The Sixth Circuit has not construed "excusable neglect" under Bankruptcy Rule 9006(b),[6] It has, however, in commenting on Fed. R. Civ. P. 6(b), upon which Rule

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[6] In a case construing Bankruptcy Rule 906(b), the predecessor to Rule 9006 (b), the Sixth Circuit found that "[n]on-receipt [of a notice of the claims bar date by the creditor or his attorney] is sufficient ground for excusable neglect." Bratton v. The Yoder Co. In re Yoder Co.), 758 F.2d 1114, 1121 (6th Cir. 1985) the facts of In re Yoder are clearly inapposite to those confronting the court in the instant proceeding.

9006(b) is patterned, observed:[7]

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[7] Fed. R. Civ. P. 6(b) provides:

Rule 6. Time

(b) Enlargement. When by these rules or by a notice given hereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . . .

Rule 6(b)(2) has remained substantially unchanged since 1946.

> [Rule 6(b)(2)] would seem to be designed to afford relief to a party whose failure to take timely required steps might be properly classified as "excusable neglect."

Anderson v. Yungkau, 153 F.2d 685, 687 (6th Cir. 1946), aff'd 67 S.Ct. 428 (1947).

District Judge Neese of this district, in denying a late-filed motion by a plaintiff seeking additional time to respond to a motion for summary judgement, stated:

> The plaintiff was required to have submitted any response to the defendant's motion within 5 days after the service thereof. Local Rule 12(b). He could have obtained readily an enlargement of

> this period had he sought the same within the 5-day period, Rule 6(b)(1), Federal Rules of Civil Procedure; however, because of his failure to do so, this Court can only grant an extension of time within which to respond to the defendant's motion upon a showing of excusable neglect. Rule 6(b)(2), Federal Rules of Civil Procedure.... "[Counsel] should not expect an application under Rule 6(b)(2) to be granted when failure to act was due to simple inadvertence or a mistake regarding the content of the rules or unfamiliarity with them ...." 4 Wright & Miller, Federal Practice and Procedure 622, ss 1165.

Sherrod v. Piedmont Aviation, Inc., 516 F.Supp. 39, 41 n.1 (E.D. Tenn. 1978)

(emphasis added).

Bankruptcy Judge Speer, commenting on excusable neglect within the context of former Bankruptcy Rule 906(b), observed:

> Under this rule, the Court may, at its discretion, permit a party to perform an act subsequent to the specified term in which it must otherwise be done if the party can show that the failure to do the act within the time was the result of excuseable [sic] neglect. Although the determination as to whether or not excuseable [sic] neglect is present must be made on a case-by-case basis, it is generally held that if the delay resulted from factors which were within the control of the delinquent party, then the failure is not the result of excuseable [sic] neglect. Beneficial Finance Company of Hartford v. Manning (Matter of Manning), 4 B.C.D. 304 (Bkcy. D. Conn. 1978), In re Grethen, 14 B.R. 221 (Bkcy. N.D. Iowa 1981).

In re Schotz, 57 B.R. 259, 261-62 (Bankr. N.D. Ohio 1986).

Clinton, West Knoxville, and Brunswick acknowledge receipt of the April 13, 1989 notice in ample time to file claims prior to the August 3, 1989 bar date. Further, Marc Richards, counsel for the Partnerships, and Mark Berlin attended Creditors' meetings held far in advance of the bar date. Mr. Berlin testified that the Partnerships relied upon Counsel to protect their interests; that counsel was

provided a copy of the Partnership' bankruptcy file; and that counsel advised him that the filing of claims was "not a matter of urgency." Mr. Berlin, an attorney and certified public accountant, is an experienced businessman and Mr. Richards is an experienced bankruptcy attorney. This court, on the record before it, cannot find that the failure of Clinton, West Knoxville, and Brunswick to file claims prior to expiration of the bar date was "due to circumstances . . . beyond [their] reasonable control." In re South Atlantic Financial Corp., 767 F.2d at 817 (quoting In re Manning, 4 B.C.D. 304, 305 (D. Conn. 1978)).

Ft. Oglethorpe cannot successfully contend it did not also receive notice of the debtor's Chapter 11 case in time to permit it to file a claim. Mr. Berlin received the April 13, 1989 Notice. He

cannot close his eyes to the fact that he is also president of Pudding Enterprises, Inc. , general partner of Ft. Oglethorpe. More conclusively, Mr. Berlin appeared on behalf of Ft. Oglethorpe at the adjourned meeting of creditors held May 19, 1989, and employed counsel to represent it in mid-June, 1989. Ft. Oglethorpe's failure to timely file a proof of claim is not excused by the fact that a separate Notice addressed to it was not received by Mr. Berlin. See In re Terex Corp., 45 B.R. 290, 293 (Bankr. N.D. Ohio 1985) (widow who received notice individually deemed also to have received notice in capacity as executrix of deceased husband's estate).

The Partnerships have not established that their failure to timely file proofs of claim is the result of "excusable neglect" under Bankruptcy Rule

9006(b)(1).

III

The Partnerships urge the court to grant their motion on general grounds of equity. They aver that an extension of the bar date will in no way prejudice the debtor; that such an extension will not adversely affect the administration of the estate; that there are irregularities in the debtor's schedules; that the delay in filing the Partnerships' proofs of Claim was occasioned in part by counsel's withdrawal from his prior law firm;[8] and

[8] Marc Richards, in his affidavit, states that he was employed by the law firm of Myerson & Kuhn until July 31, 1989; that he and three other partners and associates of Myerson & Kuhn resigned from that firm

that the Partnerships have participated in the debtor's Chapter 11 case since its inception.

This court is aware that some courts have examined the prejudicial effect of a late filing in determining the existence of "excusable neglect." See e.g., In re Four Seasons Security Laws Litigation 493 F.2d 1288, 1290-91 (10th Cir. 1974) (construing excusable neglect under Fed. R. Civ. P. 6(b)(2)); Dix v. Johnson (In re Dix), 95 B.R. 134, 138 (9th Cir. BAP 1988) (applying a liberal definition of excusable neglect under Bankruptcy Rule 9006(b)(1) which

because of disputes and differences with the remaining partners; that from mid-July through the end of the month his attention was largely diverted in seeking to negotiate an amicable withdrawal from Myerson & Kuhn; and that prior to and after his resignation he was unable to obtain access to the Partnerships' files.

factors in equitable considerations); In re O.P.M. Leasing Services, Inc., 35 B.R. 854, 866 (Bankr. S.D.N.Y. 1983) (construing excusable neglect under Bankruptcy Rule 9006(b)(1)). This court, however, is persuaded that the better authority is established in opinions out of the United States Courts of Appeal for the Third, Fourth and Eleventh Circuits.

The Third Circuit in In re Vertientes, Ltd., stated:

> [U]nder Rule 9006(b)(1), a bankruptcy court does have discretion to extend time to file a proof of claim, but only under the circumstances set forth in the two situations described in the Rule.
>
> . . . .

> Rule 3003(c)(3) must be read in conjunction with Rule 9006(b). Under these Rules, the bankruptcy court's discretion to extend time is limited to two situations -- requesets [sic] made before the expiration of the originally prescribed time limitation, and where failure to act was due to excusable neglect. The court has no discretion to grant an extension simply because no prejudice would result, or for any other equitable reason.

845 F.2d at 59-60 (citations omitted (emphasis added).

The Eleventh Circuit is in accord

that the focus of "excusable neglect" under Bankruptcy Rule 9006(b)(1) "is on the movant's actions and the reasons for those actions, not on the effect that the extension might have on the other parties' positions." In re South Atlantic Financial Corp., 767 F.2d at 819.

The Sixth Circuit in Anderson and Judge Neese in Sherrod, supra, discuss "excusable neglect" under Fed. R. Civ. P. 6(b) within the context of the moving parties' "failure to act". There is no hint that either court was willing to go beyond the clear language of the Rule to consider factors other than the movant's actions. For this court to grant the Partnerships' motion, it would need to ignore the language of Rule 9006(b)(1) which authorizes an extension of time "on motion made after the expiration of the specified period ... where the failure to

act was the result of excusable neglect." (emphasis added).

The court believes the construction afforded Bankruptcy Rule 9006(b)(1) by the Third, Fourth, and Eleventh Circuits to be logically consistent with the plain meaning of the Rule. It further believes the Sixth Circuit's statements in Anderson and the district court's statements in Sherrod compel a similar construction of Rule 9006(b)(1) by this Court.

Notwithstanding that this court's sympathies may lie with the Partnerships, it cannot judicially expand Rule 9006(b)(1) to add a ground for extending the time to perform an act within a specified period based upon general equitable considerations. The United States Supreme Court recently stated that "whatever equitable powers remain in the bankruptcy

courts must and can only be exercised within the confines of the Bankruptcy Code." Norwest Bank Worthington v. Ahlers, 485 U.S. 197, ____ 108 S.Ct. 963, 968-9, 99 L.Ed.2d 169, 179 (1988). This court is bound by this principle.

For the reasons set forth herein, the court cannot extend the bar date for filing proofs of claim by the Partnerships nor can it enter an order allowing the filing of the Partnerships' claims nunc pro tunc to the August 3, 1989 claims bar date. The Partnerships' motion will be denied.

This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052. An appropriate order will be entered.

FILED: October 10, 1989.

BY THE COURT

RICHARD STAIR, JR.
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 3-89-01058

PIONEER INVESTMENT SERVICES
COMPANY a/k/a PREMIERE
RESTAURANT INVESTMENT COMPANY

Debtor

O R D E R

For the reasons set forth in the "Memorandum On Motion To Extend Time To File Proofs Of Claim Or To Allow Filing Of Proofs Of Claim Nunc Pro Tunc" filed this date, the motion filed August 23, 1989, by Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership, and Ft. Oglethorpe Associates Limited Partnership seeking an extension of time to file proofs of claim or,

alternatively, to allow the filing of proofs of claim nunc pro tunc, is DENIED.

SO ORDERED.

ENTER: October 10, 1989

BY THE COURT

RICHARD STAIR, JR.
United States Bankruptcy Judge

APPENDIX F

No. 90-6339

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
OCT 28, 1991
LEONARD GREEN, CLERK

IN RE: PIONEER INVESTMENT SERVICES COMPANY, Debtor ---------- BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, ET AL., Plaintiffs-Appellants, v. PIONEER INVESTMENT SERVICES COMPANY Defendant-Appellee.	)	ORDER

BEFORE: JONES and NORRIS, Circuit Judges; and JOINER,* Senior United States District Judge.

The court having received a petition for rehearing en banc, and the petition

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* Hon. Charles W. Joiner sitting by designation from the Eastern District of Michigan

having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel. The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

(2)

No. 91-1695

Supreme Court, U.S.
FILED
MAY 21 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PIONEER INVESTMENT SERVICES COMPANY,
Petitioner,

v.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP, AND WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel For Respondents

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the Petition for Writ of Certiorari is jurisdictionally out of time because Petitioner's tender of a Petition conforming to the Supreme Court Rules occurred almost three months after the final date for filing the Petition.
2. Whether this Court should review the definition of "excusable neglect" under Bankruptcy Rule 9006(b)(1) when the particular circumstances of this case make it highly unlikely that a creditor of a bankrupt debtor will file its proof of claim late for the same reasons.
3. Whether this Court should review the interpretation of "excusable

neglect" under Bankruptcy Rule 9006(b)(1) when (a) a fundamental analysis of the logical definition of "excusable neglect" necessarily includes the consideration of equitable factors and (b) the needs of Chapter 11 cases permit a more flexible approach than the one urged by Petitioner in this case.

PARENT COMPANY AND CORPORATE SUBSIDIARIES/AFFILIATES OF RESPONDENTS

The following is a list of the corporate general partners for each of the Respondents:

(a) Brunswick Associates, Limited Partnership - Robriste Enterprises, Inc., General Partner

(b) Clinton Associates, Limited Partnership - Robriste Enterprises, Inc., General Partner

(c) Ft. Oglethorpe Associates, Limited Partnership - Pudding Enterprises, Inc., General Partner

(d) West Knoxville Associates, Limited Partnership - Robriste Enterprises, Inc., General Partner

The corporate general partners do not have any parent or subsidiary corporations.

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No. 91-1695

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PIONEER INVESTMENT SERVICES COMPANY,
Petitioner,

v.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP, AND WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PROVISIONS OF LAW

1. Supreme Court Rule 13.4 provides in pertinent part:

> The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered . . . . However, if a petition for rehearing is timely

> filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing . . . . A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

2. Bankruptcy Rule 3002(c) provides in pertinent part:

> In a Chapter 7 liquidation . . . case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code . . . .

3. Bankruptcy Rule 9006(b) provides in pertinent part:

> (3) ENLARGEMENT. The court may enlarge the time for taking actions under Rules . . . 3002(c), only to the extent and under the conditions stated in those rules.

4. Supreme Court Rule 33.7 provides in pertinent part:

> The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but

> shall return it indicating to the defaulting party any failure to comply. The filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted.

STATEMENT OF THE CASE

On April 12, 1989, the Petitioner, Pioneer Investment Services Company ("PISCO"), filed a Petition for Reorganization under Chapter 11 of the United States Bankruptcy Code, coupled with a list of its 20 largest unsecured creditors. This list included Respondents Brunswick Associates Limited Partnership ("Brunswick"), Clinton Associates Limited Partnership ("Clinton") and West Knoxville Associates Limited Partnership ("West Knoxville") (collectively, "Respondents"). Respondent Ft. Oglethorpe Associates Limited Partnership ("Ft. Oglethorpe") was not listed. On the same day, the bankruptcy court entered its routine order entitled "Notice for Meeting of Creditors"

(the "Notice") setting (a) May 5, 1989 as the date for the creditors' meeting required under § 341(a) of the Bankruptcy Code and (b) a "bar date" of August 3, 1989. This Notice provided in relevant part:

> You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 U.S.C. § 1111 & Bankruptcy Rule 3003.
>
> Bar date is August 3, 1989.

The Respondents retained as legal counsel Marc Richards ("Richards"), who at that time was with the New York firm of Myerson & Kuhn.

PISCO requested and was granted two extensions by the bankruptcy court through May 17, 1989, within which to file its Statement of Affairs and Bankruptcy Schedules. On May 18, 1989, one day late, PISCO filed its Statement of Affairs and Schedules of Assets and Liabilities. The Respondents, however, were not scheduled as

creditors although three of them previously had been listed on PISCO's list of its 20 largest unsecured creditors.

The first meeting of creditors was held on May 19, 1989. Shortly after this meeting, PISCO filed an amended Schedule of Assets and Liabilities listing Brunswick, Clinton and West Knoxville as having contingent, unliquidated and disputed claims. On June 2, 1989, 16 days late, PISCO filed an amended list of its 20 largest unsecured creditors. None of the Respondents were included on that list. On June 5, 1989, the United States Trustee appointed an official committee of unsecured creditors, including Clinton.

On July 31, three days before the "bar date" set forth in the Notice, PISCO filed the first of three motions for an extension of time to file its plan of reorganization. The bankruptcy court granted this motion and gave PISCO an additional 60 days in

which to file its plan. On November 8, 1989, PISCO requested a second extension, until November 14, 1989, to file its plan. This request was granted without objection. PISCO, however, missed this deadline also. On December 15, 1989, a day after the extension had expired, PISCO submitted a third motion for yet another extension of the exclusive period for filing its plan. PISCO finally filed its plan of reorganization on January 2, 1990.

Precisely 20 days after the expiration of the August 3, 1989 "bar date," the Respondents filed their first and only motion for an extension of time: a motion to extend the time to file their proofs of claim or, in the alternative, to allow the filing of their proofs of claim *nunc pro tunc* August 3, 1989. With their motion, Respondents tendered proofs of claim totaling $6,943,139. After an evidentiary hearing, the bankruptcy court, by order

dated October 10, 1989, denied the motion for extension of time. Respondents appealed that denial and on February 20, 1990, the district court reversed the bankruptcy court's ruling.

The district court held that the bankruptcy court had applied an overly strict standard of "excusable neglect," under Bankruptcy Rule 9006(b) by permitting the late filing of proofs of claim only when the failure to timely file is due to circumstances beyond the creditors' reasonable control. The district court instructed the bankruptcy court to consider the following equitable factors derived from the opinion of the Bankruptcy Appeals Panel for the Ninth Circuit in In re Dix, 95 B.R. 134 (9th Cir. B.A.P. 1988): (1) whether granting the extension would prejudice the debtor; (2) the length of the delay and its impact on efficient court administration; (3) whether the creditor

acted in good faith; (4) whether clients should be penalized for their attorney's mistake or neglect; and (5) whether the delay was beyond the reasonable control of the person whose duty it was to perform. In addition, the district court instructed the bankruptcy court to consider whether Respondents' failure to timely file their claims resulted from "negligence, indifference or culpable conduct" on the part of the Respondents or their counsel, following the standards set forth in INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F.2d 391 (6th Cir. 1987).

On June 8, 1990, the bankruptcy court conducted another hearing. The bankruptcy court made no further findings of fact but held that even under the more liberal interpretation of "excusable neglect," there was no basis for allowing the Respondents to file their claims 20 days

late. The Respondents again appealed to the district court which affirmed the decision of the bankruptcy court on September 12, 1990. Respondents timely appealed to the United States Court of Appeals for the Sixth Circuit.

The Sixth Circuit reversed. The Sixth Circuit disagreed with the bankruptcy court's original decision to adopt the strict interpretation of "excusable neglect" and upheld the district court's decision that the more liberal approach to the concept of excusable neglect was the proper one. It also held that four of the five Dix factors were weighed in favor of the Respondents, and concluded that the bankruptcy court "inappropriately penalized the plaintiffs for the errors of their counsel" because the failure to file the proofs of claim on time were due in large part to the fact that Respondents' counsel affirmatively told Respondents that there

was no urgency with respect to the filing deadline and that Respondents relied on that advice.

One of the pivotal bases of the Sixth Circuit's decision was that the notice containing the "bar date" was incorporated in a document entitled "Notice for Meeting of Creditors" and that this designation would not serve to put those persons without extensive bankruptcy experience on notice that the date reflected at the end of the notice was intended to be the final date for filing of a proof of claims. The court noted that Official Bankruptcy Form 16 provided a model for notifying creditors of a proof of claims deadline in a Chapter 11 bankruptcy.1/ The Sixth Circuit then compared the clarity of Form 16 with the ambiguity in the Notice sent to Brunswick,

---

1/ Official Bankruptcy Form 16 has been revised and is now incorporated as Official Bankruptcy Form B9F. A copy of this form is included at 1a., Appendix infra.

Clinton and West Knoxville: "This ambiguity is exacerbated by the fact that the notice was simply and inconspicuously labeled 'Bar date' without any reference to its significance as a deadline for the filing of proof of claims. Even persons experienced in bankruptcy might confuse such a label for other deadlines." (Petitioner's App. A., 10a.) The court concluded that although Berlin (President of Respondents' corporate general partners) was an experienced businessman, he had no expertise in bankruptcy and that even if he had seen the Notice he would not have understood necessarily the significance of the date contained therein. Id.

In the final paragraph of its opinion, the Sixth Circuit held that in the context of default judgments, "absent prejudice to the plaintiff or culpable conduct on the part of the defendant, the policy of hearing claims on the merits weighs in

favor of allowing the claims to go forward." The court added that the same considerations should apply analyzing a failure to meet a filing deadline for proof of claims where the fault is clearly attributable to the attorney, and no prejudice results to the debtor.

PISCO filed a Petition for Rehearing and Suggestion for Rehearing in Banc which the Sixth Circuit denied on October 28, 1991.

On January 27, 1992, PISCO tendered its Petition For A Writ of Certiorari, which was rejected by the Clerk of this Court because it did not conform to the Supreme Court Rules (the "Rules"). On March 9, 1992, PISCO again tendered a Petition For A Writ of Certiorari, which the Clerk once again rejected as nonconforming. Finally on April 21, 1992--almost three months after the required filing date--PISCO finally tendered a

Petition which complies with the Rules of this Court.

ARGUMENT

I. PETITIONER'S FILING OF ITS PETITION FOR WRIT OF CERTIORARI IS JURISDICTIONALLY OUT OF TIME.

This Court recently has explained that the time for filing a petition for writ of certiorari is a jurisdictional requirement with which petitioners must comply in order to have access to this Court's review process:

> (1) the 90-day limit is mandatory, and jurisdictional, and (2) the United States Supreme Court has no authority to extend the period for filing except as Congress permits; . . . unless the . . . petition for certiorari was filed within 90 days of the entry of the Court of Appeals' judgment, the Supreme Court must dismiss the petition.

Missouri v. Jenkins, 495 U.S. 33 (1990).

PISCO was required to file its Petition within 90 days after October 28, 1992, the date its petition for rehearing was denied. Rule 13.4. PISCO made its first effort to tender its Petition on

January 27, 1992. That version and a second version tendered a month and a half later were rejected because they did not conform to the requirements of the Rules. PISCO waited more than another month to tender its third version which was finally accepted by the Clerk in late April 1992.

Rule 33.7 of this Court provides that filings which the Clerk returns as nonconforming are not to be deemed untimely if proper copies are provided "promptly." In this case, PISCO's filing of a proper petition almost three months after the due date cannot be considered to have been done "promptly." The petition should therefore be dismissed.

Dismissal is especially appropriate because this case involves the issue of timely compliance with procedural rules. After arguing that Respondents' proofs of claims should not be filed late, it is ironic indeed for PISCO now to fail to

comply timely with a jurisdictional filing requirement. If this Court is to review the parameters of "excusable neglect" in the context of a late filing, as PISCO urges it to do here, it should do so in a case in which the Petitioner itself has strictly complied with the time limits for filing its Petition For A Writ of Certiorari. PISCO's own neglect causes this to be an inappropriate case in which to review the questions presented.

II. THIS COURT SHOULD NOT REVIEW THE DEFINITION OF "EXCUSABLE NEGLECT" BECAUSE THE CIRCUMSTANCES OF THIS CASE MAKE IT UNLIKELY THAT A CREDITOR OF A BANKRUPT DEBTOR WILL FILE ITS PROOF OF CLAIM LATE FOR THE SAME REASONS.

This Court should not grant the writ because the facts in this case, especially the bankruptcy court's use of a very misleading form of "bar date" notice, are not likely to reoccur. The Sixth Circuit found it very significant that the "bar date" was cryptically imbedded in a

document entitled simply "Notice for Meeting of Creditors." The circuit court suggested that the very title of the Notice was misleading because it explicitly conveyed a singular, limited purpose. As the court noted, the mere words "Bar date," with no explanation of or reference to the filing of proofs of claims, added to the confusion. The ambiguity of the bankruptcy court's Notice contrasts sharply with the clarity provided by Official Bankruptcy Form 16 (now revised as Official Bankruptcy Form B9F). The official form leaves no doubt as to its purpose or as to when a creditor must file his proof of claims. This official form is now used today by the vast majority of bankruptcy courts.

The recent development of Official Bankruptcy Form 16 (now revised as Official Bankruptcy Form B9F), make it clear that the resolution of this issue is unnecessary at this time. Future claimants in Chapter

11 cases will be unable to argue, and courts will be unlikely to find, that the notice of bar date included in the Official Form lacks appropriate, clear instructions or is ambiguous, as was the Notice in this case. Instead, the revised Official Bankruptcy Form B9F clearly and adequately informs all creditors of their claim filing obligations. See Appendix at 5a. Thus, the likelihood of another case arising under similar facts is much diminished today, eliminating the need to review the definition of "excusable neglect" under these circumstances.

III. THIS COURT SHOULD NOT REVIEW THE INTERPRETATION OF "EXCUSABLE NEGLECT" BECAUSE AN ANALYSIS OF THE LOGICAL DEFINITION OF "EXCUSABLE NEGLECT" NECESSARILY INCLUDES THE CONSIDERATION OF EQUITABLE FACTORS, AND THE NEEDS OF CHAPTER 11 CASES PERMIT A MORE FLEXIBLE APPROACH THAN THE ONE URGED BY PETITIONER IN THIS CASE.

The basic distinction between a liberal and strict standard of excusable neglect is that the former permits--indeed,

requires--the consideration of equitable factors. See Dix, supra. Excusable neglect under the more strict interpretation urged by PISCO exists only when the failure to timely perform was due to circumstances "beyond the reasonable control" of the party. This "beyond reasonable control" test is inconsistent with a logical definition of excusable neglect, because if something is beyond a person's control he cannot have been neglectful. Instead, the appropriate concern under such a standard should be: (1) whether there is "neglect", and (2) if so, whether such neglect is "excusable." See Consolidated Freightways Corp. v. Larson, 827 F.2d 916, 919 (3rd Cir. 1987).

The bankruptcy court, however, improperly elevated this "beyond reasonable control" element as the most important part of the Dix test. Logically, however, the other factors--good faith, lack of

prejudice to the debtor, lack of impact on court administration, and whether the clients should be penalized for their attorney's neglect (all of which the Sixth Circuit resolved in Respondents' favor)--are more relevant when determining whether any neglect is "excusable" than is the single "beyond the reasonable control" element.

The Sixth Circuit's adoption of a liberal interpretation of "excusable neglect" in a Chapter 11 case also is more consistent with the bankruptcy rules and the needs of a Chapter 11 case. For good reason there are vast differences between Chapter 7 liquidation deadlines and Chapter 11 reorganization deadlines. Except for certain narrow exceptions, the deadline for filing a proof of claim in a Chapter 7 liquidation case is absolute. See Bankruptcy Rule 3002(c). Moreover, the general standard of excusable neglect for

late filings under Bankruptcy Rule 9006(b) cannot be considered for late filings of Chapter 7 proofs of claim. See Bankruptcy Rule 9006(b). In contrast, the deadline for filing Chapter 11 proofs of claim is not absolute and the exceptions are not as restrictive. Bankruptcy Rule 3003(c), unlike Bankruptcy Rule 3002(c), expressly allows the deadline for filing Chapter 11 claims to be extended for "cause." Thus, while a Chapter 7 creditor may not obtain a late extension of time unless it is within the narrow exceptions of Bankruptcy Rule 3002(c), a Chapter 11 creditor may obtain an extension upon a showing of "cause" or "excusable neglect." 8 Collier on Bankruptcy ¶ 3003(05)[4] (16th ed. 1989) ("Unlike Bankruptcy Rule 3002, Bankruptcy Rule 3003(c) does not set up a statute of limitations leaving the court with no discretion to allow late filed claims").

In In re Chicago, Rock Island & Pacific R. Co., 788 F.2d 1280, 1281 (7th Cir. 1986), the Seventh Circuit discussed the purpose of a Chapter 11 proof of claims deadline:

> The setting of a deadline, in advance of approval of the plan of reorganization, for filing claims, and the barring of claims filed beyond the deadline is a familiar and sensible measure in a reorganization proceeding and . . . is currently authorized by Bankr.R. 3003(c)(3). It creates a mechanism by which the trustee in bankruptcy can estimate the potential liabilities of the bankrupt in advance of formulating a plan of reorganization.

Thus, the claim filing deadline in a Chapter 11 case is most important when the debtor is in the process of formulating a plan of reorganization. If creditors are permitted to file proofs of claim at any time after the debtor's disclosure statement and proposed plan of reorganization are filed, the debtor could be forced to amend its plan and disclosure statement. The resulting delay necessarily

would adversely impact court administration and the resolution of the debtor's bankruptcy case. The debtor and other creditors would be prejudiced. In a large bankruptcy case such as this one, however, the debtor may not begin formulating a plan for many months. Thus, short delays early in the case usually will not be prejudicial. The bankruptcy rules recognize this by permitting courts to be flexible in permitting time extensions for "cause" or when the neglect causing a late filing is "excusable."

In this case, after obtaining several time extensions (one of which was applied for late, without excuse), PISCO did not file its plan and disclosure statement until over four months after the Respondents tendered their proofs of claim. Further, this plan and disclosure statement were amended several times. In short, the Sixth Circuit properly interpreted the

Bankruptcy Rules as allowing the court the flexibility to permit the late filing where the debtor's own repeated delays and time extensions caused Respondents' 20-day delay to be insignificant.

Finally, the consideration of equitable factors such as those outlined in Dix comports with the analysis undertaken by courts faced with determining whether a party has shown the requisite "good cause" for setting aside a default judgment. See, e.g., INVST, supra; United Coin Meter Co., Inc. v. Seaboard Coastline R.R., 705 F.2d 839 (6th Cir. 1983). Generally these courts find the most significant factors when making such determination to be whether the plaintiff will be prejudiced if the default is set aside, whether the defendant has a meritorious defense and whether culpable conduct of the defendant led to the default. By refusing to file Respondents' proofs of claim, the

bankruptcy court was, in effect, entering a default judgment against them. The very same factors that courts use to analyze the propriety of a request to set aside a default judgment are appropriate in determining whether a late-filing creditor has shown the requisite excusable neglect under Bankruptcy Rule 9006(b)(1). For these and the other reasons stated by the Sixth Circuit in its opinion, its holding was correct and should not be reviewed by this Court.

CONCLUSION

The Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES BANKRUPTCY COURT

Eastern District of Tennessee

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 of the BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Case)

Case Number:
Date Filed (or Converted) :

IN RE(NAME OF DEBTOR) ADDRESS OF DEBTOR

NAME/ADDRESS OF ATTORNEY FOR DEBTOR

TELEPHONE NUMBER:

NAME/ADDRESS OF TRUSTEE

TELEPHONE NUMBER:

DATE/TIME/LOCATION OF MEETING OF CREDITORS

[ ] Corporation [ ] Partnership

COMMENCEMENT OF CASE. A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all

documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the

debtor should review Sec. 362 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the commencement of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(a)(5), is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from

time to time by notice at the meeting, without further written notice to the creditors.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. The deadline for filing a proof of claim is set out below. A creditor who desires to rely on the schedules of creditors has the responsibility for determining that the claim is listed accurately. The place to file a proof of

claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

Filing Claims: Deadline to file a Proof of claim is [Date]

For the Court: _____
Clerk of the Bankruptcy Court

Date: _____ FORM B9F 0001

(3)

FILED
JUL 30 1992
OFFICE OF THE CLERK

JOINT APPENDIX

In The

Supreme Court of the United States

October Term, 1992

No. 91-1695

PIONEER INVESTMENT SERVICES, COMPANY,
Petitioner,

vs.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP and WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI FILED JANUARY 27, 1992
CERTIORARI GRANTED JUNE 15, 1992

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Date	Proceedings
4/12/89	List of Creditors Holding 20 Largest Unsecured Claims.
4/12/89	Motion for Extension of Time to File the Schedules of Assets and Liabilities, Statement of Financial Affairs, and Amended List of its Twenty Largest Unsecured Creditors, and Exhibit A.
4/13/89	Notice for Meeting of Creditors.
5/18/89	Statement of Affairs.
5/18/89	Schedules of Assets and Liabilities.
5/25/89	Amended Statement of Affairs.
5/25/89	Amended Schedules of Assets and Liabilities.
6/16/89	Meeting of Creditors Held; Debtor Examined; Proceeding Memo.
6/19/89	Notice of Appearance of Marc E. Richards, Esq. of the firm of Myerson & Kuhn as Counsel for Clinton Associates Limited Partnership and Request to Receive Notices.
9/8/89	Memorandum of Pioneer in Response to Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates

Appendix A

Limited Partnership, and Ft. Oglethorpe Associates Limited Partnership to Extend the Time to File Proofs of Claim or, in the Alternative, to Allow the Filing of their Proofs of Claim Nunc Pro Tunc.

9/13/89 Supplemental Memorandum in Support of Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership, and Ft. Oglethorpe Associates Limited Partnership's Motion to Extend Time to File Proofs of Claim.

9/14/89 Hearing on Motion to Extend Time to File Claims Clinton Assoc., Held; Decision Reserved; (Exhibits 1 and 2 Filed).

10/10/89 Memorandum on Motion to Extend Time to File Proofs of Claim or to Allow Filing of Proofs of Claim Nunc Pro Tunc. Copy to Marc E. Richards of Milgrim, Thomajan & Lee, P.C., Attys. for Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership, and Ft. Oglethorpe Associates Limited Partnership; Craig J. Donaldson of Dearborn & Ewing, Attys. for Debtor; John A. Walker, Jr. of Walker & Walker, P.C., Atty. for Committee of Unsecured Creditors; and U.S. Trustee.

10/10/89 Order Denying the Motion Filed Aug. 23, 1989, by Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership, and Ft. Oglethorpe Associates Limited Partnership Seeking Extension of

Appendix A

Time to File Proofs of Claim or, Alternatively, to Allow the Filing of Proofs of Claim Nunc Pro Tunc. Copy to Same Parties as in Next Above Entry; J. Michael Winchester, Esq.; and R. Thomas Stinnett, Esq.

10/20/89 Notice of Appeal by Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership, and Ft. Oglethorpe Associates Limited Partnership to Memorandum and Order entered October 10, 1989. Notice of the Filing of the Notice of Appeal Served Upon Marc E. Richards, Atty. for appellants; Craig J. Donaldson, Atty. for Debtor; and John A. Walker, Jr., Atty. for Committee of Unsecured Creditors; and U.S. Trustee.

10/31/89 Designation of Appellant of Record and Statement of Issues on Appeal.

11/8/89 Designation of Appellee, Pioneer Investment Services Co. of Additional Items to be Included in the Record on Appeal and Statement of Issues on Appeal.

11/9/89 Transcript of Proceedings on Motion to Extend Time to File Claims Held September 14, 1989.

11/16/89 Request by Brunswick Associates Limited Partnership, Clinton Associates Limited, et., that Notice be Given to Hunton & Williams, Esq.

11/17/89 Joint Motion of Brunswick Associates Limited Partnership, Ft. Oglethorpe Associates Limited

Appendix A

Partnership, and West Knoxville Associates Limited Partnership, Milgrim Thomajan & Lee, P.C., and Hunton & Williams that Marc E. Richards and Milgrim Thomajan & Lee, P.C. be relieved as counsel of record and that John A. Lucas and Hunton & Williams be substituted as counsel for the Partnerships in this case.

11/27/89 Agreed Order that John A. Lucas, Esq. and the firm Hunton & Williams are Substituted as Counsel for Brunswick Associates Limited Partnership, Clinton Associates Limited Partnership, Ft. Oglethorpe Associates Limited Partnership, West Knoxville Associates Limited Partnership in These Proceedings, Including, But Not Limited to the Appeal of the Court's Order of Oct. 10, 1989, and That Marc E. Richards and the Firm of Milgrim Thomajan & Lee, P.C. are relieved as counsel of record. Copy to Atty. for Debtor; Atty. for Creditors Committee, U.S. Trustee; Marc E. Richards of Milgrim Thomajan & Lee, P.C.; John A. Lucas of Hunton & Williams; Mark A. Berlin, President of Said Partnerships.

2/20/90 Memorandum Opinion Remanding Case to the Bankruptcy Court for Reconsideration of the Appellants' Motion for Relief.

2/20/90 Order that the Decision of the Bankruptcy Court Denying the Appellants' Motion for an Extension of Time Within Which to File Their Proofs of Claim in this Bankruptcy Case is Affirmed in Part and Reversed in Part; These Proceedings are Remanded to the Bankruptcy Court for Reconsideration of

Appendix A

Appellants' Motion in Accordance With Instructions Stated in This Court's Memorandum Opinion.

2/20/90 Bankruptcy Court's Docket Sheet in This Case, Attached as Exhibit B to the Appendix to the Appellants' Reply Brief Filed in this Court be Treated as Part of the Record on Appeal in this Case; That Appellee's Motion to Supplement the Record on Appeal is Granted; and that the Exhibits Attached to this Motion be Treated as Part of the Record on Appeal in this Case.

3/5/90 Memorandum of Debtor In Opposition to Motion of Brunswick Associates Limited Partnership, Clinton Associates Limited Partnership, Fort Oglethrope Associates Limited Partnership, and West Knoxville Associates Limited Partnership to Extend Time to File Proofs of Claim, or in the Alternative, to Allow the Filing of Claims Nunc Pro Tunc.

3/6/90 Order, on Feb. 20, 1990, the District Court Affirmed in Part and Reversed in Part This Court's Order Entered Oct. 10, 1989, Denying The Motion of Brunswick Associates Limited Partnershp, Clinton Associates Limited Partnership, Fort Oglethorpe Associates Limited Partnership, and West Knoxville Associates Limited Partnership Seeking an Extension of Time Within Which to File Their Proofs of Claim; the Proceedings Were Remanded to this Court for Reconsideration of the Partnerships' Motion in Accordance with the Instructions Stated in Memorandum Opinion Accompanying the District Court's Feb. 20, 1990 Order; at an Unrelated Hearing

Appendix A

in the Debtor's Case Held Feb. 22, 1990, the Court, at the Partnership's Request, Set Oral Argument on the Partnership's Motion for Extension of Time for Mar. 14, 1990 at 2:30 p.m.; Further, the court set a Deadline of Mar. 5, 1990, for the Filing of Briefs by the Partnerships and the Debtor; On Feb. 27, 1990, the Debtor Filed a Notice of Appeal with the Clerk of the District Court Perfecting Its Appeal from the Feb. 20, 1990 Order of the District Court to the U.S. Court of Appeals for the Sixth Circuit; this Court Accordingly Declines to Proceed Further on the Partnership's Motion; the Mar. 14, 1990 Hearing is Stricken. Copy to Atty. For Debtor, John A. Walker, Jr., Atty for Creditors Committee; U.S. Trustee; and John A. Lucas and Howard E. Frasier, Jr. Attys. for Said Partnerships; R. Thomas Stinnett; and J. Michael Winchester.

3/9/90	Motion of Brunswick Associates Limited Partnership, Clinton Associates Limited Partnership, Fort Oglethorpe Associates Limited Partnership, and West Knoxille Associates Limited Partnership, For Reconsideration of Order Entered Sua Sponte on Mar. 6, 1990.
3/9/90	Memorandum of Claimant Partnerships in Support of Their Motion to Reconsider in Next Above Entry.
6/8/90	Argument: Allowance of Late Filed Claim of "The Partnerships", Held; Findings and Conclusions Rendered.
6/15/90	Notice of Appeal by Brunswick Associates Limited

Appendix A

Partnership, Clinton Associates Limited Partnership, Fort Oglethorpe Associates Limited Partnership, and West Knoxville Associates Limited Partnership to Final Order Entered June 8, 1990.

6/18/90	Notice of the Filing of the Notice of Appeal Served Upon John A. Lucas and Howard E. Frasier, Jr., Attys. for Appellants; Craig J. Donaldson and John S. Hicks, Atty. for Debtor; John A. Walker, Jr., Atty. for Unsecured Creditors; and U.S. Trustee.
6/25/90	Designation of Appellants of Record and Statement of Issues on Appeal.

APPENDIX B — DOCKET ENTRIES FOR UNITED STATES DISTRICT COURT — CASE NO. 3-90-666

DISTRICT: 649 OFF.: 3 DOCKET NO.: 90-666 OR: 1

FILING DATE: 8-20-90 J: 3 NATURE: 422

JUDGE: JORDAN 4910 COUNTY: 47093

PLAINTIFFS:
BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP, and WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP

DEFENDANTS:
PIONEER INVESTMENT SERVICES COMPANY

Oral Argument 9/5/90, 9 a.m.

CAUSE
(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

28 USC 158 - Bankruptcy Appeal - Case no: 3-89-1058

ATTORNEYS

John A. Lucas/Howard E. Frasier, Jr.
Hunton & Williams
P.O. Box 951
Knoxville, TN 37901
(615) 549-7700

Appendix B

Pioneer Investment Svcs Company
Craig J. Donaldson
John S. Hicks
Dearborn & Ewing
Suite 1200, One Commerce Place
Nashville, TN 37239

John A. Walker, Jr.
Walker & Walker
715 First American Center
P.O. Box 2774
Knoxville, TN 37901

Patricia Foster
Assist. US Trustee
Suite 610, Plaza Tower
Knoxville, TN 37929
(615) 673-4246

Genefin, S.A.
Richard A. Sedgley
7212 Kingston Pike
Knoxville, TN 37919
(615) 693-7917

BE SURE TO MAIL A COPY
OF ALL ORDERS TO:
DONNA TEMPLE
U.S. BANKRUPTCY COURT
SUITE 1501, PLAZA TOWER
800 S. GAY STREET
KNOXVILLE, TN 37929

FILING FEES PAID: Date: 8-20-90 Receipt Number: 000001

STATISTICAL CARD: JS-5 -August 1990

Appendix B

DATE	NR.	3-90-666 PROCEEDINGS
8-20	1	RECORD ON APPEAL designated by appellants. kj
8-20		NOTICE to attys w/copy of Rule 8009.kj
8-20	2	BRIEF OF THE APPELLANTS w/exhibits C/S kj
8-22	3	EMERGENCY MOTION OF APPELLANTS TO CONSOLIDATE APPEALS AND FOR EXPEDITED ORAL ARGUMENT AND DECISION ON APPEAL w/exhibits C/S kj
8-22	3A	MEMORANDUM IN SUPPORT OF APPELLANTS' EMERGENCY MOTION TO CONSOLIDATE APPEALS AND FOR EXPEDITED ORAL ARGUMENT AND DECISION ON APPEAL C/S kj
8-22	4	BRIEF OF THE APPELLANTS ON STANDING ISSUE w/exhibits C/S kj
8-23	5	AMENDED CERTIFICATE OF SERVICE as to the Brief of Appellants On Standing Issue gl
8-29	6	ORDER (USDJ Jordan) granting appellants' emergency motion for consolidation & for expedited consideration. Oral argument set for 9-5-90 at 9 a.m. Appellee shall file brief by 8-31-90. Parties shall not file any add'l briefs. C/M gl

Appendix B

9-4	7	BRIEF OF APPELLEE, PIONEER INVESTMENT C/S gl
9-5	8	CTRM MINUTES Oral Argument. Brief to be filed by 9-10-90. Order to follow. CR N Kocuba. CD G Love. OB 126, p 1. gl
9-5	9	BRIEF OF APPELLEE PIONEER INVESTMENT SERVICES, ON STANDING ISSUE C/S gl
9-12	10	MEMORANDUM OPINION (USDJ JORDAN) In support of the following Order. C/M kj
9-12	11	ORDER (USDJ JORDAN) Setting aside Court's Order #6 for consolidation & affirming the US Bankruptcy Court's Order dated 6-8-90 denying appellants' motion for leave to file their proofs of claim after the bar date. C/M kj

OFF THE DOCKET

10-9	12	NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT by Brunswick Associates Ltd. Partnership. C/S ng
10-9	13	APPELLANTS' STATEMENT OF ISSUES ON APPEAL AND DESIGNATION OF RECORD TO BE CERTIFIED AND TRANSMITTED TO THE CLERK OF THE COURT OF APPEALS. C/S ng

Appendix B

10-9 RECEIPT #02228 in for the amt of $105.00. ng

10-22 TRANSMISSION FORM forwarding certified copies of Notice of Appeal #12, Appellants Statement of issues on appeal & designation of record to be certified & transmitted to the Clerk of the Ct of Appeals #13, Memorandum Opinion #10 & Order #11 & updated docket entries to US Court of Appeals w/copies to John A. Lucas, Howard E. Frasier, PO Box 951, Knoxville, TN 37901; Craig Donaldson/John Hicks, Suite 1200, One Commerce Place, Nashville, TN 37239; US Bankruptcy Ct, Donna Temple, Suite 1501, Plaza Tower, 800 S. Gay St., Knoxville, TN 37929; John A. Walker, 715 First American Center, PO Box 2774, Knoxville, TN 37901; Patricia Foster, Suite 610, Plaza Tower, Knoxville, TN 37929; Richard Sedgley, 7212 Kingston Pike, Knoxville, TN 37919.

11-13 14 TRANSCRIPT ORDER filed - transcript is already on file in Clerk's office. ng

APPENDIX C — VOLUNTARY PETITION OF PIONEER INVESTMENT SERVICES COMPANY UNDER CHAPTER 11 FILED APRIL 12, 1989

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

CASE NO. 3-89-01058
CHAPTER 11

IN RE:
PIONEER INVESTMENT SERVICES COMPANY a/k/a PREMIERE RESTAURANT INVESTMENT COMPANY,

Debtor.

EMPLOYER'S TAX IDENTIFICATION NUMBER: 62-1217172

VOLUNTARY PETITION UNDER CHAPTER 11

1. Petitioner's post office address is Post Office Box 90444, Knoxville, Tennessee 37990.

2. Petitioner has had its principal place of business within this district for the 180 days immediately preceding the filing of this Petition.

3. Petitioner is qualified to file this Petition in that it is qualified to be a debtor under Chapter 11 of the Bankruptcy Code.

4. A list of debtor's creditors accompanies this Petition.

WHEREFORE, Petitioner prays for relief under Chapter 11 of the Bankruptcy Code.

Appendix C

DEARBORN & EWING
BY: s/ John S. Hicks
Craig J. Donaldson
John S. Hicks
Suite 1200, One Commerce Place
Nashville, TN 37239
615/259-3560

ATTORNEYS FOR PIONEER INVESTMENT SERVICES COMPANY

I, D.A. Campbell, the Secretary/Treasurer of the corporation named as Petitioner in the foregoing Petition, declare under the penalty of perjury that the foregoing is true and correct, and that the filing of this Petition on behalf of the corporation has been authorized.

Executed on April 12, 1989.

PIONEER INVESTMENT SERVICES COMPANY

BY: s/ D.A. Cambell
D.A. Campbell/
Secretary/Treasurer

Appendix C

EXHIBIT A

FOR COURT USE ONLY

_____
Date Petition Filed

_____
Case Number

_____
Bankruptcy Judge

1. Petitioner's employer identification number is 62-1217172.

2. None of Petitioner's securities are registered under Section 12 of the Securities and Exchange Act of 1934.

3. The following financial date is the latest available information and refers to Petitioner's condition on April 12, 1989.

a. Total assets: $_____
b. Total liabilities: $_____

		Approximate number of holders
Secured debt, excluding that listed below	$_____	_____
Debt securities held by more than 100 holders	$_____	_____

Appendix C

Secured	$_____	_____
Unsecured	$_____	_____
Other liabilities, excluding contingent or unliquidated claims	$_____	_____
Number of shares of common stock	$_____	_____

4. Petitioner is engaged in the development and sale of real property for commercial and residential use.

5. The name of any person who directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the voting securities of Petitioner is Naxos Holding, B.V.

6. The names of all corporations 20% or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held, with power to vote, by Petitioner are:

Pioneer Insurance and Managers, Inc.	100%
Pioneer Video, Inc.	80%
Systems Specialists, Inc.	100%
Zimmer Restaurant, Inc .	80%
Paragon Properties, Inc.	80%
Centrum Construction, Inc.	80%
Premiere Hotel Corp.	100%
Pioneer Nursery, Inc.	80%
The Cleaning Service Company, Inc.	80%
Diversified Mortgage Investors of Tennessee, Inc.	100%
Premiere Investment Properties, Inc.	90%
Santa Laura, Inc.	100%
Coninco, Inc.	50%

Appendix C

BANKRUPTCY PETITION COVER SHEET

Case Number: 3-89-01058

Name of Debtor: PIONEER INVESTMENT SERVICES COMPANY

All Other Names, Including Trade Names, Used by the Debtor in the Last 6 Years:
PREMIERE RESTAURANT INVESTMENT COMPANY

Social Security No. and/or Employer's Tax ID NO.: 62-1217172

Address of Debtor: 9111 Cross Park Drive, Suite 400
Knoxville, TN 37990

Name of County: Knox

TYPE OF PETITION: Voluntary Petition

FILING FEE: Filing Fee Attached

CHAPTER OF THE BANKRUPTCY CODE UNDER WHICH THE PETITION IS FILED: Chapter 11

NATURE OF DEBT: Business

A. FORM OF ORGANIZATION: Corporation Closely Held

B. TYPE OF BUSINESS: Real Estate

DEBTOR'S ESTIMATES

ESTIMATED NUMBER OF CREDITORS: 50-99

Appendix C

ESTIMATED ASSETS (IN THOUSANDS OF DOLLARS):
1000-over

ESTIMATED LIABILITIES (IN THOUSANDS OF DOLLARS):
1000-over

ATTORNEY FOR THE DEBTOR:
Craig J. Donaldson/John S. Hicks
Suite 1200, One Commerce Place
Nashville, TN 37239
615/259-3560

DATE: 4-11-89

PRINT NAME OF ATTORNEY:
Craig J. Donaldson/John S. Hicks

SIGNATURE OF ATTORNEY: s/ John S. Hicks

FILED: April 12, 1989

APPENDIX D — LIST OF CREDITORS OF PIONEER INVESTMENT SERVICES COMPANY HOLDING TWENTY LARGEST UNSECURED CLAIMS FILED APRIL 12, 1989

EXHIBIT A

LIST OF CREDITORS HOLDING 20 LARGEST UNSECURED CLAIMS

A) Name of Creditors with Mailing Address	B) Name, Address and Telephone Number of person or dept. familiar with claim.	C) Nature of Claim	D) Indicate if Claim is contingent, unliquidated, disputed or subject to setoff.	E) Amount (if secured value of security)
Barber & McMurry, Inc. 2505 Kingston Pike Knoxville, TN 37919				
Brunswick Associates Limited Partnership c/o Schulman & Berlin 150 East 52nd Street New York, New York 10022				

Carraige Hill Insurance Agency
8861 Kingston Pike
Knoxville, TN 37923

Centrum Construction Co.
9111 Cross Park Drive
Suite 430
Knoxville, TN 37923

Circuit City Stores, Inc.
2040 Thalbro Street
Richmond, VA 23230

Clinton Associates Limited
Partnership
c/o Powsner & Powsner
599 Lexington Avenue
28th Floor
New York, New York 10022

Cooper & Lybrand
1600 Plaza Tower
Knoxville, TN 37929

Credit Card Service Center
P.O. Box 1545
Memphis, TN 38101-0001

Del-Air Service Company
340 Radford Place
Knoxville, TN

Goody's Family Clothing
1612 Congress Parkway
Athens, TN 37303

Heiskell, Donelson, Bearman,
Adams, et al.
First Tennessee Building
20th Floor
165 Madison Avenue
Memphis, TN 38103

Housekeeping Maintenance System
P.O. Box 90231
Knoxville, TN 37990

Kennerly, Montgomery & Finley
P.O. Box 442
Knoxville, TN 37901

Plitt Theatres
ATTN: Mr. Bill Rith
1925 Century Park East
Suite 300
Los Angeles, CA 90067-4787

Promensal, N.A.
24 Avenue de Champel
1206 Geneva, Switzerland

R.P. Industries
P.O. Box 40816
Nashville, TN 37204

Ross/Fowler
406 W. Church Avenue
Knoxvill, TN 37902

Ticor Title Insurance Company
ATTN: Pat Pollard
6300 Wilshire Blvd.
Suite 2000
Los Angeles, CA 90048

M.A. Turner
P.O. Box 90444
Knoxville, TN 37990

West Knoxville Associates
Limited Partnership
c/o Schulman & Berlin
150 East 52nd Street
New York, New York 10022

APPENDIX E — DOCKET ENTRY COVER SHEET FOR UNITED STATES BANKRUPTCY COURT CASE NO. 3-89-01058 ORIGINALLY PREPARED APRIL 12, 1989

ORDER CONFIRMING PLAN ENTERED 10-17-90

F.F. Pd.

341 MEETING: 06/16/89 2:30 P.M.

CLAIM DEADLINE: 08/03/89

DIST. NO.: 0649

OFF. NO.: 3

YR-DOCKET NO.: 89-01058RS-11A

DATE FILED: 04/12/89

JOINT PETITION?: False

NAME OF DEBTOR: PIONEER INVESTMENT SERVICES COMPANY

AKA/DBA: PREMIERE RESTAURANT INVESTMENT

SSAN OR TAX ID: 62-1217172

ADDRESS OF DEBTOR:
POST OFFICE BOX 90444
KNOXVILLE TN 37990 .

NAME OF COUNTY: Knox TN

Appendix E

COUNTY CODE: 47093

JUDGE NAME: Stair, Richard, Jr.

CODE: A390

TYPE OF CASE: Voluntary

COMMENCED UNDER: Chapter 11

NATURE OF DEBTOR: Business

ORG FORM: Corp. Close Held

TYPE OF BUS.: Real Estate

EST. NUMBER OF CREDITORS: 50 to 99

EST. ASSETS (IN 000'S): 1000 & Over

EST. LIABILITIES (IN 000'S): 1000 & Over

NUMBER OF EMPLOYEES: 0

NUMBER OF EQUITY SECURITY HOLDERS: 0

ATTORNEY FOR DEBTOR:
(Dearborn & Ewing)
Donaldson, Craig J./John S. Hicks
1200 One Commerce Pl.
Nashville, TN 37239 615/259-3560

Appendix E

OTHER ATTORNEY FOR CREDITORS COMMITTEE:
Walker & Walker
John A. Walker, Jr.
P.O. Box 2774
Knoxville, TN 37901

Entry Dt.	Case Record Entry
	Stmt of Affrs & Sch or Ch. 12/13 Stmt Attorney Statement of Compensation Apptmt of Trustee
	Trus Bond & Order/ Trustee's Acceptnce
4/12/89	Notice of § 341 mtng & Certif of mailing § 341 date: 06/16/89 § 341 Time: 2:30 P.M. § 341 Locations: 4
	Last dt for disch/dischbtlty complnts:
4/12/89	Claims Bar date: 08/03/89
	Notice of Confrm Hrg Hrng Date: / / Time: Loc:
	§ 341 mtng Conducted
	Discharge entered
	Notice of Discharge/ Certif of mailing
	Trustee Final Report No Asset Assets

Appendix E

DATE	BANKRUPTCY CASE RECORD
1989	
4-12	LIST of Equity Security Holders, filed. cm
4-12	LIST of creditors holding 20 largest unsecured claims, filed. cm
4-12	MOTION for extension of time to file the Schedules of Assets and Liabilities, Statement of Financial Affairs, and amended list of its twenty largest unsecured creditors, and Exhibit A, filed. cm
4-12	APPLICATION of debtor for employment of law firm of Dearborn & Ewing as its attys., filed. cb
4-13	RESOLUTION of Pioneer Investment Services Company, filed. cm
4-17	ORDER that Motion for extension of time to file the Schedules of Assets and Liabilities, Statement of Financial Affairs, an amended list of its twenty largest unsecured creditors, and Exhibit A is granted, and Debtor shall have through and including May 1, 1989 within which to file the remaining schedules,entered. Copy to debtor, Atty. for Debtor, and U.S. Trustee. cm
4-17	NOTICE of hearing on Application of Debtor for Employment of Attorneys, set for April 28, 1989, at 1:30 p.m., in Knoxville, TN, mailed to Debtor, Attys. for Debtor, U.S. Trustee with copy of

Appendix E

Application, and 20 Largest Unsecured Creditors with copy of Application. sl

4-18 ORDER that 1) debtor file original of all monthly operating reports, serve copy of each on specified parties and certify service; 2) notices required by subsection (a)(2), (3) and (7), subsection (b) and subsection (f)(8) of B.R. 2002 shall be given by debtor; unless otherwise directed by the court, debtor will mail to specified parties notices required by subsection (a)(2) and (3) of B.R. 2002, and will certify service; 3) motions and notices of hearings required by subsections (b), (c) and (d) of B.R. 4001 shall be served by debtor on specified parties, and debtor will certify service within 24 hours; 4) the court will hold a hearing on all motions filed pursuant to B.R. 4001(b), (c) and (d); 5) the clerk will provide a hearing date and time only after the filing of a motion and notice required to be served by the debtor under the provisions of this order, entered. Copy to debtor, atty. for debtor, and U.S. Trustee. cb

4-25 DEMAND of Fleet National Bank, pursuant to § 363 and NOTICE pursuant to § 546(b) of the Bankruptcy Code for debtor's segregation of cash collateral and accounting, filed.

APPENDIX F — NOTICE FOR MEETING OF CREDITORS OF PIONEER INVESTMENT SERVICES COMPANY FILED APRIL 13, 1989

U.S. Bankruptcy Court for the Eastern District of TN
Courtroom, 15th Floor, Plaza Tower, Knoxville, Tennessee

In Re a Petition for Relief under Chapter 11 of Title 11, U.S. Code, filed by or against the below-named Debtor(s) on April 12, 1989:

DEBTOR:
PIONEER INVESTMENT SERVICES COMPANY OF POST OFFICE BOX 90444, KNOXVILLE, TN 37990, aka/dba PREMIERE RESTAURANT INVESTMENT COMPANY, ID: 62-1217172

CASE NO. 89-01058RS-11A

You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 USC Sec 1111 & Bankruptcy rule 3003.
Bar date is August 3, 1989.

NOTICE FOR MEETING OF CREDITORS

ATTY FOR DEBTOR:
Craig J. Donaldson, 1200 One Commerce Pl., Nashville, TN 37239 Phone: 615/259-3560 and John S. Hicks

ITEM NO. 1 —
§ 341(a) MEETING DATE: May 5, 1989 at 1:30 P.M. in Meeting Room, Suite 610, Plaza Tower, Knoxville, Tennessee

Appendix F

ITEM NO. 2 —

FILING DEADLINE FOR § 523(c)/§ 727 COMPLAINTS: Not applicable.

A meeting of creditors pursuant to 11 U.S.C. § 341(a) shall be held at the time and place specified in ITEM NO 1 above at which time creditors may examine the debtor and file claims.

The debtor [and joint debtor, if any] and attorney for debtor(s) shall be in attendance at the § 341(a) meeting. A partnership shall appear by a general partner, a corporation by its president or other executive officer.

Failure of the debtor or his attorney to appear at the § 341(a) meeting or to timely file schedules and statement of affairs may result in dismissal.

Upon filing of the petition, certain acts and proceedings against the debtor and the estate are stayed as provided in 11 U.S.C. § 362(a).

Dated: April 13, 1989

RICHARD STAIR, JR.,
U.S. BANKRUPTCY JUDGE

APPENDIX G — MOTION TO EXTEND THE TIME TO FILE PROOFS OF CLAIM FOR .THE RESPONDENTS WITH ATTACHED AFFIDAVITS OF MARK A. BERLIN AND MARC E. RICHARDS FILED AUGUST 23, 1989

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Case No. 3-89-01058
Chapter 11

In re

PIONEER INVESTMENT SERVICES COMPANY,

Debtor.

MOTION TO EXTEND THE TIME TO FILE PROOFS OF CLAIM OF CLINTON ASSOCIATES LIMITED PARTNERSHIP, WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP, BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP AND FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP, OR, IN THE ALTERNATIVE, TO ALLOW THE FILING OF THE PARTNERSHIPS' PROOFS OF CLAIM NUNC PRO TUNC

PLEASE TAKE NOTICE that Clinton Associated Limited Partnership, West Knoxville Associated Limited Partnership, Brunswick Associates Limited Partnership and Ft. Oglethorpe Associates Limited Partnership (collectively the "Partnerships") will move before the Honorable Richard Stair, Jr. on the 14th day of September, 1989 at 2:30 o'clock in the afternoon, or as soon thereafter as counsel can be heard, in the United States Bankruptcy

Appendix G

Court for the Eastern District of Tennessee, 15th floor, Plaza Tower, Knoxville, Tennessee 37929 for entry of an order pursuant to Rules 3003 (c) (3) and 9006 (b) of the Rules of Bankruptcy Procedure ("Bankruptcy Rules") to extend the date within which the Partnerships may file their proofs of claim, or in the alternative, to allow the filing of the Partnerships' proofs of claim nunc pro tunc as of the Bar Date in this case.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, must be served in order that they be received in hand by counsel for the Partnerships no less than five business days prior to the hearing date.

Yours very truly,

MILGRIM THOMAJAN
& LEE P.C.

By: s/Marc E. Richards
Marc E. Richards
A Member of the Firm

53 Wall Street
New York, New York 10005-2815
(212) 858-5300
Attorneys for Clinton Associates
Limited Partnership, West Knoxville
Associates Limited Partnership,
Brunswick Associates LimitedPartnership
and Ft. Oglethorpe Associates Limited
Partnership

Appendix G

To:
Craig J. Donaldson, Esq.
John Hicks, Esq.
Dearborn & Ewing
One Commerce Plaza
Nashville, Tennessee 37239
Attorneys for Debtor

John Walker, Esq.
Walker & Walker, P.C.
715 First American Center
Knoxville, Tennessee 37901
Attorneys for Creditors' Committee

William Sonenberg, Esq.
Office of the U.S. Trustee
900 Georgia Avenue
Chattanooga, Tennessee 37402

Appendix G

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Case No. 3-89-01058
Chapter 11

In re

PIONEER INVESTMENT SERVICES COMPANY,

Debtor.

AFFIDAVIT IN SUPPORT OF MOTION TO EXTEND TIME FOR FILING PROOFS OF CLAIM

MARK A. BERLIN, being duly sworn, deposes and says:

1. I am the president of Robriste Enterprises, Inc. the general partner of Clinton Associates Limited Partnership ("Clinton"), West Knoxville Associates Limited Partnership ("West Knoxville"), Brunswick Associates Limited Partnership ("Brunswick") and the president of Pudding Enterprises Incorporated, a general partner of Ft. Oglethorpe Associates Limited Partnership ("Ft. Oglethorpe") (collectively the "Partnerships") and submit this affidavit, along with that of counsel, in support of the Partnerships' motion to extend the date within which the Partnerships may file their proofs of claim, or, in the alternative, to allow the filing of the Partnerships' proofs of claim nunc pro tunc as of the bar date for filing proofs of claim. The Partnerships' motion should in all respects be granted for each of

Appendix G

the following important reasons:

(i) the extension of time for the Partnerships to file their proofs of claim will in no way prejudice the debtor, Pioneer Investment Services Company ("Pioneer" or "Debtor"), which only filed its voluntary Chapter 11 petition on April 12, 1989;

(ii) the modest delay of several weeks in extending the bar date will not adversely affect the administration of this case;

(iii) there are fundamental irregularities in the Debtor's schedules, as amended, with respect to various claims, and Debtor's counsel has informed me that further amendments will be filed;

(iv) the delay in filing the Partnerships' proofs of claim was occasioned in no small measure due to the withdrawal of counsel from his prior law firm coupled with the inaccessibility of files; and

(v) the Partnerships have actively and extensively participated in this Chapter 11 case since its inception.

I respectively submit that in light of all the circumstances set forth - including the irregularities and omissions in the schedules - the Debtor's conduct by listing the Partnerships claims as "contingent, unliquidated and disputed" was at best disingenuous but more likely an effort to misrepresent the extent of its liabilities and gerrymander the reorganization process.

a) Prior Proceedings

2. The Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code on April 12, 1989 ("Filing Date"). By order of

this Court dated April 13, 1989 the first Section 341(a) meeting of creditors was scheduled for May 5, 1989 ("Bar Date"). In routine fashion the order set the bar date for August 3, 1989, notwithstanding the fact that the Debtor's schedules had not been filed. At that time, Clinton, West Knoxville and Brunswick (but not their bankruptcy counsel who had not yet been retained) received notice of the April 13 order, having been listed as one of the twenty largest creditors. Ft. Oglethorpe did not receive notice.

3. I attended the first scheduled Section 341(a) meeting in Knoxville on May 5. I participated in the examination of the Debtor and noted for the record, along with the U.S. Trustee, the futility of continuing the Debtor's examination in light of the incompleteness of the Debtor's schedules and statement of affairs. It should be noted the the Debtor's schedules filed on April 18 did not even list the Partnerships as unsecured creditors. The Section 341(a) meeting was adjourned by the U.S. Trustee until June 16, 1989.

4. I attended the adjourned Section 341(a) meeting with counsel on June 16. A review of the Debtor's amended bankruptcy schedules, as filed on May 25, 1989, along with the testimony given by Milton Turner, the Debtor's president,* reveals an incestuous network of business entities whose affairs are interrelated with those of Turner. Indeed, several creditors voiced concerned at the June 16 adjourned 341(a) meeting over the apparent irregularities and omissions in the Debtor's filings. By way of illustration, the Debtor included on its amended schedules the claim of Genefin, S.A. ("Genefin") for almost $1.9 million. The basis of the debt to Genefin remains a topic of conjecture as Genefin - possibly a related entity to Pioneer or Turner - conducts business out of the same

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* Mr. Turner is an individual debtor in a case now pending before this Court. On motion of parties in interest a Chapter 7 trustee has been appointed in his case.

address as other Pioneer-Turner entities and is the address for the sole stockholder of Pioneer. The Debtor's amended schedules also reflect an unsecured claim of Turner for in excess of $3.2 million. Between the Turner and Genefin claims, insiders control more than fifty percent of the unsecured debt. Thus, it appears that the scheduling of these two claims, and the listing of other major claims as "disputed unliquidated and contingent" is a means to gerrymander the reorganization process. During the course of the questioning of the Debtor, repeated requests were made to amendment the schedules and provide additional information. To the best of my knowledge, no such supplement by the Debtor had been made, despite the passage of some two months. Indeed, for the past three months I have requested, both orally and in writing, of the Debtor and its counsel copies of Pioneer's certified financial statements prepared by Coopers & Lybrand for the years ending June 30, 1986 and 1987. That information has not yet been supplied to me, nor Committee counsel.

5. At the very least the Debtor's schedules have been replete with inconsistency, omission and confusion. As noted, the original schedules filed on or about April 18 did not even list the Partnerships' claims, notwithstanding the Debtor's inclusion of Clinton, Brunswick and West Knoxville on the list of twenty largest creditors submitted on the Filing Date. The amended schedules filed May 25 list the Partnerships' claims, save for Ft. Oglethorpe, as "contingent, unliquidated and disputed." Ft. Oglethorpe is not scheduled. After the adjourned Section 341 meeting, the Debtor acknowledged that further amendments were necessary. Thus, the Debtor will amend its schedules yet a second time.

6. Just prior to the adjourned Section 341(a) meeting, the Partnerships retained as bankruptcy counsel, Marc E. Richards, then a member of the law firm Myerson & Kuhn in New York. Mr.

Richards filed a notice of appearance and request for service of papers on behalf of the Partnerships on or about June 13, 1989.

7. By notice dated June 1, 1989, the Office of the United States Trustee appointed a committee of unsecured creditors ("Committee"), including Clinton. The Committee first met prior to the adjourned Section 341(a) meeting on June 16, and decided to retain counsel. In mid-July, some four weeks later, the firm of Walker & Walker formally was retained by order of this Court as counsel to the Committee with responsibility to, *inter alia*, investigate the acts, conduct and affairs of the Debtor. Most recently, on August 16 the Committee met in Knoxville to select accountants to investigate the underpinnings of the web of the Pioneer-Turner related entities.

8. Other than the initial notice of the Section 341 meeting, there has been no further notice from the Court, nor indeed any discussion or mention by the Committee, its counsel the United States Trustee or other parties in interest as to the Bar Date. I am advised by Committee counsel that Pioneer is the largest Chapter 11 case pending in this district. There is no urgency to bar the filing of claims less than four months after the Filing Date. While that short time frame may be warranted in simple and less complicated cases, it is hardly warranted here. No plan of reorganization has been filed. Rather, the parties, including the Debtor, have been involved in difficult litigation with the Cain Partnership, which, I am advised, is waiting decision by the Court. Until that matter is resolved definitively and other investigation undertaken and completed, a plan cannot be confirmed. Thus, there is no basis to assert that a modest delay in extending the bar date for the Partnerships would delay or impair the administration of this case. Indeed, in light of the vagueness and omissions in the Debtor's schedules, and the likelihood that an extension of the bar date across

the board for all creditors would be warranted.

9. As noted, the Partnerships retained Mr. Richards as bankruptcy counsel in mid June, 1989. At that time, I had Partnerships' bankruptcy file reproduced and given to Mr. Richards. I also inquired as to the timing for filing the Partnerships' proofs of claim. Richards advised me that as there was no bar date that the filing of the Partnerships' proof of claim was not a matter of urgency.

10. Although the Partnerships, save Ft. Oglethorpe, received notice of the Court's April 13 order, bankruptcy counsel advised me that he has no recollection of having received that or any other notice. Nor, I am advised did Richards ever receive any other notice from the bankruptcy court or any other party with respect to the August 3 Bar Date.

11. In the meantime, and as set forth in greater detail in accompanying affidavit, Richards and several other bankruptcy partners withdrew from Myerson & Kuhn as of July 31, 1989. I am advised by Richards that the files in this case along with others were not released by Myerson & Kuhn until August 15, 1989. In fact, I am advised that the Clinton/Pioneer file still has not been delivered and remains missing.

12. It is respectfully submitted that the severe disruption in Mr. Richards' practice occasioned by the circumstances of his withdrawal from Myerson & Kuhn is more that sufficient "cause" under Bankruptcy Rule 3003(c)(3) in and of itself to enable the Bankruptcy Court to extend the time within which proofs of claim may be filed. There is hardly any prejudice that would be occasioned upon the Debtor, especially at the incipiency of this Chapter 11 case.

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b) Partnerships' Relationship with Debtor

13. Although not required for the purpose of the instant motion, I believe it would be helpful for the Court to be made aware of the relationship between the Debtor and each of the four Partnerships. By way of background, three of the four Partnerships, save Brunswick, are parties to separate real estate purchase agreements with Pioneer dated January 1, 1988. It was contemplated that these Partnerships would sell the properties — all of which were shopping centers — to the Debtor. However, the Debtor breached each of these agreements by failing to close on the purchases. The Partnerships have suffered damages in excess of several million dollars as set forth on the Partnerships' accompanying proofs of claim annexed as Exhibit A. The Partnerships' measure of damages is not only the difference between the contract purchase price and the best price now realizable, but also includes claims for non-payment of prior master lease rent, conversion of tenant rents and tenant security deposits, property repairs and similar claims pursuant to previous sale—leaseback transactions.

14. For the Debtor to assert in its amended schedules that the Partnerships claims are "disputed, contingent and unliquidated" is, at best, disingenuous and comes dangerously close to constituting a misleading and erroneous statement. Notwithstanding, I am prepared to meet any objection concerning the bona fides of the Partnerships' proofs of claim. Yet to preclude the Partnerships from now filing their proofs of claim would be tantamount to allowing this Debtor to reap an unwarranted and unjustified windfall.

WHEREFORE, for all the foregoing reasons, and for those set forth in the accompanying affidavit and memorandum, it is respectfully submitted that the Partnerships' motion to extend the

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time within which to file their proofs of claim, or in the alternative, to allow the filing of the Partnerships' proof of claim nunc pro tunc as of the Bar Date pursuant to Bankruptcy Rules 3003(c)(3) and 9006(b) be granted.

By: s/ Mark A. Berlin
Mark A. Berlin

Sworn to before me this 22nd day of August, 1989
Lily Chin
Notary Public, State of New York
No. 03-4859344
Qualified in Bronx County
Commission Expires April 21, 1990

Appendix G

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

Case No. 389-10158
Chapter 11

In re

PIONEER INVESTMENT SERVICES COMPANY,

Debtor.

PROOF OF CLAIM

1. Robriste Enterprises, Inc., with a place of business at Suite 419, 915 Middle River Drive, Ft. Lauderdale, Florida 33304, by its President, Mark A. Berlin, who resides at 21180-13 Mainsail Circle, North Miami Beach, Florida 33180, is the General Partner of Clinton Associates Limited Partnership, a Tennessee limited partnership ("Partnership") doing business at Suite 419, 915 Middle River Drive, Ft. Lauderdale, Florida 33304 and is authorized to make this proof of claim on behalf of the Partnership.

2. The Debtor was, at the time of the filing of the petition initiating this case, and still is, liable to the Partnership, in the sum of $1,567,650.

3. The ground of approximately $1,167,650 of this liability is that the Debtor breached a certain real estate purchase agreement dated January 1, 1988 to purchase certain property of the Partnership for the purchase price of $2,370,650 cash in excess of debt, for which the Partnership can realize now no more than $1,203,000 cash in excess of debt. The ground of approximately

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$400,000 of this liability is set forth below.

a.	Debtor retention of tenant security deposits (approximate)	$ 20,000.
b.	Debtor retention of tenant rents January 1987 through March 1987 (approximate)	60,000.
c.	Debtor failure to pay lease rent January 1987 through April 1989 (net of rent collected by Partnership) (approximate)	675,000.
d.	Property repairs paid by Partnership, unpaid by Debtor (approximate)	200,000.
e.	Debtor failure to pay underlying debt service January 1987 through April 1989 (net of Partnership's share) (approximate)	(555,000.)
		$ 400,000.

4. A duplicate of the writing on which this claim is founded is attached hereto as Exhibit A (the Real Estate Purchase Agreement), Exhibit B (letter dated June 16, 1989 setting forth best offer to date) and Exhibit C (Lease).

5. No judgment has been rendered on the claim.

6. The amount of all payments, if any, of this claim has been credited and deducted for the purpose of making this proof of claim.

7. This claim is not subject to any setoff or counter-claim.

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8. No security is held for this claim.

Full Name of Creditor	Clinton Associates Limited Partnership
Signature	s/ Mark A. Berlin, President Mark A. Berlin President Robriste Enterprises, Inc. (General Partner)
Date	August 22, 1989

Penalty for Presenting Fraudulent Claim. Fine of not more than $5,000 or imprisonment for not more than 5 years or both - Title 18, U.S.C., Section 152.

Claim No. _____ Total Amount Claimed $1,567,650

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UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

Case No. 389-01058
Chapter 11

In re

PIONEER INVESTMENT SERVICES COMPANY,

Debtor.

PROOF OF CLAIM

1. Robriste Enterprises, Inc., with a place of business at Suite 419, 915 Middle River Drive, Ft. Lauderdale, Florida 33304, by its President, Mark A. Berlin, who resides at 21180-13 Mainsail Circle, North Miami Beach, Florida 33180, is the General Partner of Brunswick Associates Limited Partnership, a Connecticut limited partnership ("Partnership") doing business at Suite 419, 915 Middle River Drive, Ft. Lauderdale, Florida 33304 and is authorized to make this proof of claim on behalf of the Partnership.

2. The Debtor was, at the time of the filing of the petition initiating this case, and still is, liable to the Partnership, in the sum of $2,364,336.

3. The grounds of this liability are set forth below:

a. Debtor transfer of property to Partnership at sale encumbered by unauthorized First National Bank of Louisville mortgage (approximate)	$ 1,590,154.

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b.	Debtor retention of tenant security deposits (approximate)	25,000.
c.	Debtor retention of tenant rents January 1987 through March 1987 (approximate)	120,000.
d.	Debtor failure to pay underlying debt service January 1987 through April 1989 (net of Partnership's share) (approximate)	55,432.
e.	Debtor failure to pay lease rent January 1987 through April 1989 (net of rent collected by Partnership) (approximate)	303,750.
f.	Debtor failure to pay property expenses January 1987 through April 1989 (net of Partnership's share) (approximate)	270,000.
		$ 2,364,336.

4. A duplicate of the writings on which this claim is founded are attached hereto as Exhibit A (Amendment and Restated Agreement of Sale), Exhibit B (Deed) and Exhibit C (Lease).

5. No judgment has been rendered on the claim.

6. The amount of all payments, if any, of this claim has been credited and deducted for the purpose of making this proof of claim.

7. This claim is not subject to any setoff or counter-claim.

8. No security is held for this claim.

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Full Name of Creditor: Brunswick Associates Limited Partnership

Signature: s/ Mark A. Berlin, President
Mark A. Berlin President
Robriste Enterprises, Inc.
(General Partner)

Date: August 22, 1989

Penalty for Presenting Fraudulent Claim. Fine of not more than $5,000 or imprisonment for not more than 5 years or both - Title 18, U.S.C., Section 152.

Claim No. _____ Total Amount Claimed $2,364,336

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UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

Case No. 389-01058
Chapter 11

In re

PIONEER INVESTMENT SERVICES COMPANY,

Debtor.

PROOF OF CLAIM

1. Robriste Enterprises, Inc., with a place of business at Suite 419, 915 Middle River Drive, Ft. Lauderdale, Florida 33304, by its President, Mark A. Berlin, who resides at 21180-13 Mainsail Circle, North Miami Beach, Florida 33180, is the General Partner of West Knoxville Associates Limited Partnership, a Connecticut limited partnership ("Partnership") doing business at Suite 419, 915 Middle River Drive, Ft. Lauderdale, Florida 33304 and is authorized to make this proof of claim on behalf of the Partnership.

2. The Debtor was, at the time of the filing of the petition initiating this case, and still is, liable to the Partnership, in the sum of $2,280,831.

3. The ground of approximately $1,232,831 of this liability is that the Debtor breached a certain real estate purchase agreement dated January 1, 1988 to purchase certain property of the Partnership for the purchase price of $1,123,831 cash in excess of debt, for which the Partnership can realize now no more than cash insufficient to pay debt by $109,000. The ground of approximately $1,048,000 of this liability is set forth as follows:

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a.	Debtor transfer of property to Partnership at sale encumbered by unauthorized First National Bank of Louisville mortgage (approximate)	$ 485,000.
b.	Debtor retention of tenant security deposits (approximate)	5,000.
c.	Debtor retention of tenant rents January 1987 through March 1987 (approximate)	54,000.
d.	Debtor failure to pay underlying debt service January 1987 through April 1989 (net of Partnership's share) (approximate)	66,500.
e.	Debtor failure to pay lease rent January 1987 through April 1989 (net of rent collected by Partnership) (approximate)	175,000.
f.	Debtor failure to pay property expenses January 1987 through April 1989 (net of Partnership's share) (approximate)	162,500.
g.	Debtor failure to place funds in escrow as per Construction Agreement, which funds would have been paid to Partnership upon Debtor default	100,000.
		$ 1,048,000.

4. A duplicate of the writing on which this claim is founded is attached hereto as Exhibit A (the Real Estate Purchase Agreement), Exhibit B (letter dated June 16, 1989 setting forth best

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offer to date), Exhibit C (Agreement of Sale), Exhibit D (Lease) and Exhibit E (Construction Agreement).

5. No judgment has been rendered on the claim.

6. The amount of all payments, if any, of this claim has been credited and deducted for the purpose of making this proof of claim.

7. This claim is not subject to any setoff or counter-claim.

8. No security is held for this claim.

Full Name of Creditor	West Knoxville Associates Limited Partnership
Signature	s/ Mark A. Berlin, President Mark A. Berlin President Robriste Enterprises, Inc. (General Partner)
Date	August 22, 1989

Penalty for Presenting Fraudulent Claim. Fine of not more than $5,000 or imprisonment for not more than 5 years or both - Title 18, U.S.C., Section 152.

Claim No. _____ Total Amount Claimed $2,280,831

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UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

Case No. 389-01058
Chapter 11

In re

PIONEER INVESTMENT SERVICES COMPANY,

Debtor.

PROOF OF CLAIM

1. Pudding Enterprises, Incorporated, with a place of business at Suite 419, 915 Middle River Drive, Ft. Lauderdale, Florida 33304, by its President, Mark A. Berlin, who resides at 21180-13 Mainsail Circle, North Miami Beach, Florida 33180, is a General Partner of Ft. Oglethorpe Associates Limited Partnership, a Connecticut limited partnership ("Partnership") doing business at Suite 419, 915 Middle River Drive, Ft. Lauderdale, Florida 33304 and is authorized to make this proof of claim on behalf of the Partnership.

2. The Debtor was, at the time of the filing of the petition initiating this case, and still is, liable to the Partnership, in the sum of $730,322.

3. The ground of approximately $429,698 of this liability is that the Debtor breached a certain real estate purchase agreement dated January 1, 1988 to purchase certain property of the Partnership for the purchase price of $2,264,698 cash in excess of debt, for which the Partnership can realize now no more than $1,835,000 cash in excess of debt. The ground of approximately

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$300,624 of this liability is set forth as follows:

a.	10 months rent under agreement of Lease due to Partnership (approximate)	$100,000.
b.	1987 and 1988 taxes unpaid by Debtor paid by K Mart and deducted by K Mart from funds due to Partnership (approximate)	49,219.
c.	Insurance payments unpaid by Debtor paid by Partnership (approximate)	7,500.
d.	CAM payments due to K Mart unpaid by Debtor and deducted by K Mart from funds due to Partnership (approximate)	3,835.
e.	1987 percentage rent due to Partnership withheld by Debtor (approximate)	45,000.
f.	Roof repairs unpaid by Debtor paid by Partnership (approximate)	10,670.
g.	Tenant finishes unpaid by Debtor paid by Partnership (approximate)	21,750.
h.	Mortgage payments unpaid by Debtor paid by Partnership (approximate)	41,000.
i.	October 1988 tenant rents collected by Debtor not paid over to Partnership (approximate)	18,000.

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j.	Utility bills unpaid by Debtor paid by Partnership (approximate)	2,450.
k.	Air conditioning repairs unpaid by Debtor paid by by Partnership (approximate)	1,200.
		$ 300,624.

4. A duplicate of the writing on which this claim is founded is attached hereto as Exhibit A (the Real Estate Purchase Agreement), Exhibit B (Agreement of Sale) and Exhibit C (Lease).

5. No judgment has been rendered on the claim.

6. The amount of all payment, if any, of this claim has been credited and deducted for the purpose of making this proof of claim.

7. This claim is not subject to any setoff or counter-claim.

8. No security is held for this claim.

Full Name of Creditor	Ft. Ogelthorpe Associated Limited Partnership
Signature	s/ Mark A. Berlin, President Mark A. Berlin President Robriste Enterprises, Inc. (General Partner)
Date	August 22, 1989

Penalty for Presenting Fraudulent Claim. Fine of not more than

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$5,000 or imprisonment for not more than 5 years or both - Title 18, U.S.C., Section 152.

Claim No. _____	Total Amount Claimed	$730,322

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Case No. 3-89-01058

In re

PIONEER INVESTMENT SERVICES COMPANY,

Debtor.

AFFIDAVIT IN SUPPORT OF MOTION TO EXTEND TIME FOR FILING PROOFS OF CLAIM

MARC E. RICHARDS, being duly sworn, deposes and says:

1. I am a member of the firm of Milgrim Thomajan & Lee P.C., attorneys for Clinton Associates Limited Partnership ("Clinton"), West Knoxville Associates Limited Partnership ("West Knoxville"), Brunswick Associates Limited Partnership ("Brunswick"), and Ft. Oglethorpe Associates Limited Partnership ("Ft. Oglethorpe") (collectively the "Partnerships"). I submit this affidavit along with that of Mark A. Berlin in support of the Partnerships' motion pursuant to Rules 3003 (c)(3) and 9006 (b)(1) of the Rules of Bankruptcy Procedure ("Bankruptcy Rules") to extend the date for the Partnerships to file their proofs of claim or, in the alternative, to allow the filing of the Partnerships' proof of claims nunc pro tunc as of August 8, 1989 ("Bar Date"). The procedural background in this Chapter 11 case, along with the relationship between the Partnerships and the debtor, Pioneer

Investment Service Company ("Pioneer" or "Debtor"), is more fully set forth in the accompanying Berlin affidavit and will not be repeated herein except to the extent necessary.

2. I submit this affidavit for the particular purpose of setting out the factual basis to warrant a finding of "cause" for permitting the late filing of the Partnerships' proofs of claim pursuant to Bankruptcy Rule 3003(c)(3).

3. By way of background until July 31, 1989, I was a partner in the law firm of Myerson & Kuhn ("M&K"), having joined that firm at the time of its formation in January, 1988. Effective July 31, 1989 I and three M&K bankruptcy partners in New York, and virtually all of the associates in the bankruptcy department resigned from M&K because of various disputes and differences with the remaining partners of the firm. To say that this was a major and significant disruption in our professional lives would be an understatement. From mid-July through the end of the month my attention was largely diverted in seeking to negotiate an amicable withdrawal from M&K along with my fellow bankruptcy partners.

4. Prior to and after my resignation, I was unable to obtain access to our files on the M&K premises, including the Clinton/Pioneer file. During the last week in July and early August, my attention was devoted to negotiating the release of our files and other issues concerning our withdrawal from M&K. Indeed, on behalf of the Partnerships Mr. Berlin wrote a letter to M&K on August 15, 1989, a copy of which is annexed as Exhibit A, to demand that the Clinton/Pioneer file be released and turned over to me. Yet, the case files of the departing members of my department were not released and delivered to our new firm until the night of August 15, 1989. I was, therefore, effectively without access to my files from the time they were packed in late July until their delivery

on August 15. Yet, even with the delivery of our files on August 15 (some two hundred transfiles) the Clinton/Pioneer file *still* has not been located and as of the time of the writing herein I still do not have that file. I am advised by M&K that they are unable to locate the Clinton/Pioneer file.

5. Before this disruption I reviewed the Clinton/Pioneer file at the clients' office in early June when I was retained in this case. I state categorically that I have no recollection of having seen or been made aware of the notice of the August 3 Bar Date apparently included in the Bankruptcy Court's April 13 order. In fact, I have no recollection of having seen the April 13 order.

6. It is respectfully submitted that the complexity of the Pioneer case and the early stage of the proceedings, coupled with the incestuous interrelationship between Pioneer, his president, Milton Turner ("Turner") and the other Turner some of whom are also debtors before this Court, simply do not warrant such an abbreviated bar date - less than four months after the Filing Date. Further, the filing and amendment of the Debtor's schedules, including the second amended schedules which have yet to be filed, indicate that the bona fides and accuracy of the Debtor's schedules may well be an issue of concern. It hardly appears consistent that the Debtor's list of twenty largest creditors included with the voluntary petition on the Filing Date lists Clinton, Brunswick and West Knoxville while less than a week later the original schedules filed made *no* reference to the Partnerships as creditors. The amended schedules, filed some five weeks later, list three of the Partnerships' claims as "disputed, unliquidated and contingent". As noted, Ft. Oglethorpe is not even listed. Now, I am advised there will be a second amendment to the schedules.

7. I have practiced in the field of a bankruptcy law for more

than seven years. I have participated in some of the larger bankruptcy cases filed across the country including: Baldwin-United, LTV, Braniff Airlines, Tacoma Boat Building, Family Health Plans a/k/a Maxicare Health Plans, DRW Realty, Wilson Foods and Spector Red Ball. To the best of my knowledge none of those larger cases had bar dates so soon after the filing date. In many instances, notices of bar dates are published in newspapers of general circulation in order to give creditors, including the creditors' committees, time to get familiar with the proceedings and have input on the establishment of a bar date. Here, the Creditors' Committee did not even first meet until June 16 and counsel was not retained until mid-July.

8. I had occasion to speak with representatives of the Partnerships, along with John Walker, counsel to the Creditors' Committee, on several occasions since my retention. Indeed, I was even telephoned by counsel for the Debtor on two separate occasions in mid-July to arrange the scheduling of depositions of Mr. Berlin and another non-party witness, Mark A. Gasarch, concerning certain litigation filed by the Debtor against Paul Powsner. Neither counsel to the Committee nor the Debtor nor the Partnerships even mentioned the Bar Date.

9. However, during the entire time since my retention, I did not see this Court's April 13 order setting the August 3 Bar Date. Despite having reviewed the Partnerships' files, I have no recollection of having seen the April 13 order. Coupled with our withdrawal from M&K, the inaccessibility of our files and irregularities and inconsistencies in the schedules, along with the total lack of prejudice to the Debtor or any other party in interest, I submit sufficient "cause" exists pursuant to Bankruptcy Rule 3003(c)(3) for this Court to extend the Bar Date so as to accept the Partnerships' proofs of claim. To do otherwise would afford the

Debtor an unjustifiable windfall. The Debtor should not be so unjustly enriched especially as the Debtor knows that the Partnerships have real and substantial claims. No legitimate purpose would be served by barring the Partnerships' claims. Thus, this case as a court of equity should be fair and allow the filing of the Partnerships' claims.

s/ Marc E. Richards
MARC E. RICHARDS

Sworn to before me this 22nd day of August, 1989
s/ Lily Chin
Lily Chin, Notary Public
State of New York
No. 03-4859344
Qualified in Bronx County
Commission Expires April 21, 1990

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ROBRISTE ENTERPRISES, INC.

915 Middle River Drive
Suite 419
Fort Lauderdale, Florida 33304
(305) 564-1558

599 Lexington Avenue
28th Floor
New York, New York 10022
(212) 326-8996

August 15, 1989

Via Facsimile & Hand

Douglas Stahl, Esq.
Myerson & Kuhn
237 Park Avenue
New York, NY 10017

Re: *Pioneer Investment Services Company, Debtor*

Dear Mr. Stahl:

By retainer agreement dated June 13, 1989 (copy enclosed) your firm was retained to represent the various limited partnerships of which Robriste Enterprises, Inc. is the general partner in the above captioned bankruptcy matter. I now understand the Marc Richards, Esq., the attorney assigned by your firm to handle this matter, is no longer with your firm.

It is most important that I receive my files from you as soon as possible. My ability to pursue my various rights and remedies in this bankruptcy matter will be severely prejudiced if I do not have immediate access to these files. Please call me at (212) 326-8996 upon your receipt of this letter to advise me where and when a

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member of my staff may appear to pick up these files.

Thank you for your cooperation and for giving this matter your immediate attention.

Very truly yours,

ROBRISTE ENTERPRISES, INC.

By
Mark A. Berlin, President

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AFFIDAVIT OF SERVICE

Marc E. Richards, being duly sworn, deposes and says: I am over the age of 18 years and not a party to this action. On the twenty-second day of August, I served the motion to extend time to file proofs of claim, the Berlin and Richards affidavits, and Memorandum of Law, by mailing same to the attorneys at the following addresses:

William Sonenberg, Esq.
Office of the U.S. Trustee
900 Georgia Avenue
Chattanooga, TN 37402

Craig J. Donaldson, Esq.
John Hicks, Esq.
Dearborn & Ewing
One Commerce Plaza
Nashville, TN 37239

John Walker, Esq.
Walker & Walker, P.C.
715 First American Center
Knoxville, TN 37901

Service was completed by depositing a true copy of the Motion and supporting papers in a prepaid properly addressed envelope, in an official depository under the exclusive care and custody of the United States Post Office within the State.

s/ Marc E. Richards
Marc E. Richards

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Sworn before me this 22nd day of August, 1989
Notary Public
Eileen M. Cumiskey
Notary Public, State of New York
No. 41-4717033
Qualified in Queens County
Commission Expires May 31, 1989

APPENDIX H — TRANSCRIPT OF HEARING ON MOTION OF RESPONDENTS TO EXTEND TIME TO FILE PROOFS OF CLAIM HEARING DATE SEPTEMBER 14, 1989

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

IN RE:

PIONEER INVESTMENT SERVICES, INC.,

Debtor.

No. 3-89-01058
CHAPTER 11

BEFORE THE HONORABLE RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

TRANSCRIPT OF PROCEEDINGS
—MOTION TO EXTEND TIME TO FILE CLAIMS—
14 September 1989

DeWick Court Reporting
118 Everett Road
Knoxville, TN 37922
615/966-7070

Carolyn C. DeWick, PCR
(home)/366-6157

Appendix H

APPEARANCES:

FOR THE DEBTOR:

Craig J. Donaldson, Esq.
DEARBORN & EWING
Suite 1200
One Commerce Place
Nashville, TN 37239

FOR CLINTON ASSOCIATES, LTD.,
WEST KNOXVILLE ASSOCIATES, LTD.,
BRUNSWICK ASSOCIATES, LTD.,
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ALSO PRESENT:

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[2] (Whereupon, the following proceedings came on to be heard on 14 September 1989, before the Honorable Richard Stair, Jr., United States Bankruptcy Judge, in this cause, holding the United States Bankruptcy Court for the Eastern District of Tennessee, Northern Division, Knoxville, Tennessee, to wit:)

THE COURT: Mr. Donaldson, in the Pioneer case;—

MR. DONALDSON: Yes, Your Honor.

THE COURT: —3-89-01058. Who are the other interested parties in that case?

MR. WINCHESTER: If the Court please, Mike Winchester. I'm here for Goody's Family Clothing.

THE COURT: Ms. Foster.

MR. WEAVER: Your Honor, John Weaver, interim trustee for Milton Turner, who is an interest holder the holding company for Pioneer.

THE COURT: We're here on a motion to extend time to file proof of claim filed by four entities; Clinton Associates, Limited,

West Knoxville Associates, Limited, Brunswick Associates, Limited, Fort Ogelthorpe Associates, Limited. The motion was filed on August 23rd by Attorney Marc Richards. Is Mr. Richards present?

MR. WINCHESTER: If the Court please, I was here before the Court at 11:00 this morning. Mr. Richards was [3] sitting back in the back here. I know he's here, from New York, but I don't see him present right now.

THE COURT: All right. I'll take that up momentarily.

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THE COURT: I'm recalling the Pioneer Investment Services Company, Chapter 11, Case Number 3-89-01058.

Mr. Donaldson represents the debtor. Who is here on behalf of these limited partnerships?

MR. RICHARDS: May it please the Court, Your Honor, Marc Richards from the firm of Milgrim, Thomajan and Lee, counsel to the movants for four separate partnerships. They are Clinton Associates, limited partnership; West Knoxville Associates, limited partnership; Brunswick Associates, limited partnership, and Fort Ogelthorpe Associates, limited partnership.

THE COURT: Are there other interested parties? Ms. Foster is here.

MR. Weaver?

MR. WINCHESTER: Is here as an interim trustee in the Turner

estate, Your Honor.

THE COURT: Mr. WINCHESTER?

MR. WINCHESTER: Yes, Your Honor.

MR. RICHARDS: Your Honor, I understood [4] that Ms. Walker was going to be here.

THE COURT: I haven't seen Ms. Walker.

MR. RICHARDS: Nor have I, sir.

THE COURT: Mr. Winchester, who do you represent?

MR. WINCHESTER: Goody's Family Clothing, Your Honor.

Your Honor, my client is also a member of the unsecured creditors' committee. As I recall, Mr. Walker may have addressed a letter to the Court. Mr. Walker is not going to be here today.

Did you say Ms. Walker?

MR. RICHARDS: Yes, I said Ms. Walker. Mr. Walker, I understood, has another engagement in Chattanooga or Nashville; but I was under the impression that Ms. Walker was going to be here.

THE COURT: Was she to be here for any particular purpose?

MR. DONALDSON: Your Honor, I might be able to shed some light on that, since I've talked with Mr. Walker. As you know, Your Honor, Ms. Walker is now in that time of year where he is educating

the Tennessee Bar. When I spoke with him, he said that he wouldn't be here, and he indicated to me that the motion we originally had would be continued and he wasn't sure whether Ms. Walker would be here [5] or not; but, my understanding was Mr. Walker didn't intend to participate, whether he was here or not.

THE COURT: All right. It's not an independent motion that the creditors' committee has before me.

MR. WINCHESTER: No, Your Honor; it's not.

THE COURT: Mr. Richards, do you have proof you care to put on this afternoon?

MR. RICHARDS: Yes, I do, Your Honor, with the Court's permission.

THE COURT: How many witnesses do you have?

MR. RICHARDS: I have one witness, Your Honor.

THE COURT: All right, sir.

Mr. Donaldson, do you have proof?

MR. DONALDSON: I don't think any proof is necessary, Your Honor. I think I'll cross-examine the witness, though.

THE COURT: All right. Have your witness stand and be sworn, please.

(witness sworn)

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THE COURT: Now, are you relying on the affidavits that you filed?

MR. RICHARDS: Your Honor, I was going to, with the Court's permission, seek to admit as an offer of [6] proof my affidavit, but I was going to offer the direct testimony of Mr. Berlin and make an opening remark, with the opportunity to close.

THE COURT: That will be fine.

Mr. Donaldson, the Rule 43, of course, permits affidavits. Do you have any objection to the affidavit?

MR. DONALDSON: No, Your Honor; I do not.

THE COURT: All right. We'll take about a ten-minute recess and then I'll hear your remarks and whatever testimony you care to offer.

(Brief recess)

THE COURT: All right, Mr. Richards.

MR. RICHARDS: Your Honor, before we begin, I checked with the calendar here setting on the counsel's desk and noticed that the matter had been set by the clerk at 1:30. When I had called and set the hearing date--and if I may approach the bench—I had gotten a 2:30 time. I apologize. We had set that at 2:30.

THE COURT: Oh, all right. Well, it's almost 3:30 now.

MR. RICHARDS: I would have begged Your Honor's apologies had we been an hour late, but we did come—

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THE COURT: Well, that's all right. You're correct. We had a calendar problem. We will assume [7] responsibility for that.

MR. RICHARDS: Your Honor, as I stated before the recess, if I might make an introductory argument;—

THE COURT: Yes, sir.

MR. RICHARDS: —and then I would like to call Mr. Berlin, and offer him as a witness.

Again, for the record, my name is Marc Richards. I'm a member of the firm of Miligrim, Thomajan and Lee. We are counsel for four of the partnerships, limited partnerships, that I will use collectively as a term during the argument.

Your Honor, this is the partnerships' motion filed on August 23 to extend the time to partnerships to file their proofs of claim, or, in the alternative, to allow the filing of the partnerships' proof of claim nunc pro tunc as of the bar date. The four proofs of claim were filed on August 23rd with the clerk of this Court.

The procedural history in this matter is really not of serious dispute amongst any of the parties. The Debtor, Pioneer, filed its petition under Chapter 11 on April 12th. On April 13th this Court set a bar date order. Three of the partnerships—that is, Clinton, West Knoxville, and Brunswick—received notice of this Court's April 13th order. Fort Ogelthorpe, the fourth separate limited partnership, did not receive notice.

[8] Debtor's schedules were filed on April 18th and did not list any of the partnerships as creditors of the estates, although the list at the filing of the petition had three of the partnerships listed amongst

the list of the twenty largest.

The Debtor's amended schedules, filed May 25th, lists three of the partnerships—that is, Clinton, West Knoxville, and Brunswick—with claims as disputed, contingent and unliquidated. The debtor's amended schedules also listed the claim of Milton Turner, the debtor's chief executive officer and chief operating officer, for some $3,246,000.00 and Genefin, G-e-n-e-f-i-n, S.A., a purportedly related entity, for a claim of almost one-point-nine-million-dollars. These two claims are in excess of 50 percent of the scheduled allowed unsecured debt.

The partnerships, through Mr. Berlin, attended the first 341 meeting on May 5th and then the adjourned one on June 16th. The partnerships retained bankruptcy counsel in mid June; and the partnerships' bankruptcy counsel withdrew from his firm—that is, me—at the end of July and suffered a major disruption in its practice; in fact, did not receive the files until the end of August.

Quite candidly, Your Honor, this is a foul-up, particularly mine, for not getting a more definitive date as to when the bar date was; but, nothwithstanding the [9] foregoing, Your Honor, under Bankruptcy Rule 3003(c), the Court may extend the time for filing proof of claim. This provision under 3003, unlike Bankruptcy Rule 3002 which sets specific time frames which may not be altered, or other specific time frames found in the Rules and the Code.

The extension of the bar date is a matter soundly within the Court's discretion, based upon a finding of cause. The legal standard, variously stated, is excusable neglect; but that's not exclusive. Rather, the Courts have variously seized upon equitable consideration, as often articulated and found in Federal Rule 60(b); and, variously stated, they are, the absence of prejudice, no delay in

the administration, allowing the debtor to prevail would provide a windfall, the good faith of the moving creditor, and delay beyond the control of the creditor.

We would submit, Your Honor, that the debtor, even the debtor concedes in its opposition that there is no prejudice and that this would not result in any delay in the administration. Allowing the debtor to prevail would, we submit, provide an unjustified windfall. We believe that the partnerships have acted in good faith; and the delay was occasioned not by the partnerships, but by its counsel.

These criteria are set forth and found by the Ninth Circuit as we cite in the case, McGoric, cited in our brief, and in the Wellming case, likewise cited in our [10] brief, and apply with equal vitality here. The equitable considerations, however, the debtor asserts, are totally irrelevant. We would submit, Your Honor, that the debtor is wrong. What's more is that the debtor has totally ignored, totally and completely ignored the irregularities found in the debtor's schedules. We would submit, Your Honor, that the reasoning, in the American Skate case, discussed at length in our brief, is particularly appropriate and provided grounds for cause, as the Court held. There, in American Skate, the debtor had listed all but one of its claims as contingent and unliquidated. Here, the major claims—that is, those of the partnerships, along with Circuit City's, are listed as contingent, disputed, and unliquidated. Moreover, the major claims of two related insiders, incestuous ones, are deemed allowed. We would submit, Your Honor, that the Skate ruling of three of the partnerships' claims—because, as I stated, and it's not disputed, Fort Ogelthorpe was never scheduled—along with that of Circuit City, and, scheduling of the Turner claim and the Genefin claim, as allowed, not only raises serious question as to the accuracy of the debtor's schedules but also calls into issue whether the debtor and Turner are carrying out their fiduciary responsibilities. It is

questionable, we submit, whether Mr. Turner, as the CEO, as chief operating officer, has acted like a fiduciary and dealt fairly with all creditors.

[11] The debtor's cases cited in its opposition memorandum, besides being factually distinguishable must also be reconciled with the extreme and the harsh result that these creditors, the partnerships, would suffer if the partnerships' motion is denied. The partnerships have substantial claims against the estate. They have filed proofs of claim in excess of $6,000,000.00. This would be, clearly, a windfall to the debtor. The reasoning in this substantial hardship and extreme hardship was critical to the Court's analysis in the Carpen case, cited at length in our brief, in our supplemental brief.

All the cases, I might also add, Your Honor, relied upon by the debtor had bar dates that were established that were significantly longer; and most of the cases had other mitigating factors that more than warranted the Court in the exercise of its discretion to deny the motion to extend the bar date. By contrast, in the case at bar, there are major irregularities in the schedule; there's an incestuous relationship between certain of the major creditors and the debtor; there is a singling out of certain larger creditors, with claims allegedly disputed; and, coupled with that is a disruption of the bankruptcy counsel's practice.

By contrast, the equitable considerations here, we would submit, militate in favor of such a very modest [12] extension.

THE COURT: Have proofs of claim been filed now?

MR. RICHARDS: Yes, sir; they were filed on August 23rd, about the time of motion.

I'll reserve additional remarks for closing; but, in conclusion, before I put on Mr. Berlin as a witness, as I stated in my opening remarks, Your Honor, I would humbly concede this counsel's foul-up for not having inquired as to the bar date or having recognized the Court's April 13th notice.

But, we submit that, under all the circumstances, it would be unfair and inequitable to visit the sins of the lawyer on the client; but, simply, there is no prejudice. Nobody has suggested that—even the debtor concedes it—and there is no reason, we believe, to give the debtor such a windfall.

THE COURT: Let me see if Mr. Donaldson wants to respond to your opening remarks.

MR. DONALDSON: If it please the Court, Your Honor, what I think I just heard was more a closing argument than an opening statement; so, I'll try to confine this part of my remarks only to what is appropriate on opening statement, reserving the rest for my closing.

If Your Honor please, I think this is a [13] very, very simple matter. You have Rule 3003(c) of the Bankruptcy Code--the Bankruptcy Rules. You have Rule 9006(b)(2). They govern, Your Honor, the time within which proofs of claim must be filed; and, it's very simple. There's two situations. One, where a creditor moves for an extension of time, before the bar date set by the Court; and that, clearly, is governed by 3003(c), and that's for good cause shown.

Whereas, here, Your Honor, the motion to extend was filed after the expiration of a bar date fixed by the Court. It's governed by the reading of Rule 3003(c) with Rule 9006(b), particularly (b)(2);

and that, really, with all due respect to the Court, removes the issue of discretion or equitable principles or anything of the like and puts it firmly on the basis of the recognized standard of excusable neglect.

The cases that we have cited, Your Honor,—from the Third Circuit, the Vertientes' case; the Fourth Circuit, the Robins' case; the 11th Circuit, the in re: South Atlantic Financial case,—the 11th, Fourth, and Third Circuit all so hold.

And I would suggest, Your Honor, by way of opening, the only relevant proof here, the only relevant issues here, are is there excusable neglect. I certainly appreciate the position that counsel may be in. I think [14] that's one of those situations where we all say, "But there, for the grace of God, go I" sometimes. It causes many if not most of us to lose sleep at night.

But I will say just as firmly, Your Honor, that the cases that we have cited on brief quite clearly establish that oversight of counsel is not excusable neglect.

I think I will reserve the rest of my remarks, Your Honor, for after the examination of Mr. Berlin.

THE COURT: All right. Have a seat right here, please sir.

MARK A. BERLIN, called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RICHARDS:

Q Mr. Berlin, will you state your name for the record, please. A Mark A. Berlin.

Q And your address, sir? A 21180 13 Main Sail Circle, North Miami Beach, Florida 33180.

Q And, Mr. Berlin, what is your profession? A I am the president of Robriste Enterprises, Inc., which is involved in the ownership and operation of real estate, as well as financial management.

[15] I am president of Pudding Enterprises, Inc., which is involved in similar activities.

I am an attorney, admitted to practice in the states of New York and Florida; and I am a Certified Public Accountant in the State of New York.

Q Mr. Berlin, is Robriste general partner of Clinton, West Knoxville, and Brunswick? A It is the sole general partner of those three partnerships.

Q But there is a different general partner of Fort Ogelthorpe; is that correct? A There are two general partners of Fort Ogelthorpe Associates; one is Pudding Enterprises, Inc., which owns a one percent interest in the partnership, and the other general partner is Kenneth G. Buttick, B-u-t-t-i-c-k, who owns a 99 percent interest in the partnership.

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Q You are president of Robriste, which is general partner of three of the partnerships, and, president of Pudding Enterprises, which is a general partnership of Fort Ogelthorpe; is that correct? A Yes; that's correct.

Q Mr. Berlin, did you receive this Court's April 13th order on behalf of Clinton, West Knoxville, and Brunswick? A Yes, sir.

[16] Q Did you receive it on behalf of Fort Ogelthorpe? A No, sir.

Q Did you attend the first meeting of creditors in this court on May 5th? A Yes, I did.

Q Did you attend the adjourned first meeting of creditors on June 16th? A Yes, sir.

Q Now, Mr. Berlin, are you familiar with the schedules initially filed by the debtor on or about April 18th? A Yes, sir; I am.

Q And did those schedules, as originally filed, list any of the four partnerships as creditors? A No; they didn't. The way in which we first found out that we were listed as creditors was that in the initial filing, where the twenty largest creditors were listed, Clinton, West Knoxville, and Brunswick were shown as three of the twenty largest creditors.

Q Now, Mr. Berlin, are you familiar with the debtor's amended schedules, filed on or about May 25th? A Yes, sir.

Q In the amended schedules, were Clinton, West Knoxville, and Brunswick listed with disputed, contingent [17] and

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unliquidated claims? A Yes, they were.

Q Do the debtor's amended schedules list an allowed unsecured claim on behalf of Milton Turner for three million-two-hundred-and-forty-odd-thousand-dollars? A Without having the schedule in front of me, I believe it does, in an amount.

MR. DONALDSON: Your Honor, I'll stipulate the schedules. They're part of the Court's record. The Court can take judicial notice.

THE COURT: The schedules speak for themselves.

I'm not sure how he's going to know the answer to those questions, Mr. Richards.

BY MR. RICHARDS:

Q Do you know who Mr. Turner is, Mr. Berlin? A He is presently the president of Pioneer Investment Services Company.

MR. RICHARDS: I take it Mr. Donaldson will stipulate that the amended schedules also reflect a claim for some one-point-nine-million dollars on behalf of Genefin; is that correct?

MR. DONALDSON: Your Honor, I said that the schedules speak for themselves; they're part of the Court Record, and the Court can judicially [18] notice any and all facts stated therein.

BY MR. RICHARDS:

Q Do you know who Genefin is, or what Genefin is, Mr. Berlin? A I know they are a creditor; and, we have asked on

several occasions as to the ownership of Genefin, basically because they show the same address as the hundred percent stockholder of Pioneer Investment Services, which, I believe, is a company called Naxos, N-a-x-o-s, and, the same address in Switzerland, and, I believe, the same address as a principal stockholder of Nexos, Mr. Neueraldo.

MR. DONALDSON: Your Honor, I'm going to object unless Mr. Berlin can state under oath that he knows for a fact who any of the stockholders of Naxos are. I don't believe it's permissible for him to speculate, or, that he guesses to be the case.

THE WITNESS: Your Honor, I'm only—

THE COURT: Just a moment. Your attorney will speak for you.

MR. RICHARDS: Your Honor, I'm merely seeking to elicit information of what the witness's knowledge is as to the incestuous nature of certain creditors listed—

THE COURT: Well, that's—

MR. DONALDSON: Your Honor, I'm going to [19]object to any further characterization—I don't mind it in argument, but as part of the question I find it objectionable.

THE COURT: Ask your question, Mr. Richards, and I'll expect Mr. Berlin to testify from his knowledge; but, go ahead.

MR. RICHARDS: Yes, Your Honor.

BY MR. RICHARDS:

Q Mr. Berlin, are you a member of the creditors' committee? A Yes, I am.

Q On behalf of which limited partnership? A Clinton Associates, limited partnership.

Q When was the creditors' committee formed? A Prior to the second meeting of creditors; sometime, I believe, in June of this year.

Q Now, you testified earlier that you participated in the first organizational meeting of the committee in or about June 16th; is that correct? A Yes, I did.

Q Mr. Berlin, did you also participate at the August 16th meeting of the creditors' committee at the offices of Mr. Walker? A Yes; We had a meeting at that time to interview potential accounting firms to represent the [20] Creditors' committee, and I took an active part in that interview .

Q Mr. Berlin, have you requested the debtor, either orally or in writing, to provide you with the debtor's annual report prepared by Coopers and Lybrand? A I requested it orally at the first hearing; I subsequently, requested it in writing; and we once again requested it, that any financial statements—I believe that June 30th, 1986 and June 30th, 1987 have certified financial statements of Coopers and Lybrand, but we have not received those statements as of this date.

Q Are you aware of any negotiations between the committee

and the debtor towards the promulgation of a plan of re-organization? A I am not aware of any. It was my understanding that everything, in effect, would be put on hold that nothing would be done until a motion—I think it's involved in the Cain partnership—is decided.

Q And are you aware that the debtor sought a modest extension of the exclusivity period, the period within which to file his plan? A Yes; I believe the order was approved recently by this Court.

Q Did you participate in any phone conversations with representatives of the debtor and the [21] committee that addressed the issue as to the amendment of the debtor's schedules? A At the meeting of the creditors' commitee held in August we had a telephone conversation with one of debtor's counsel; and it was indicated to us that further amendments to the schedules would be filed.

Q Mr. Berlin, is it your belief that granting the partnerships' motion to allow the filing of the late claims would in any fashion delay or impair the administration of this Chapter 11 case?

MR. DONALDSON: Your Honor, for the record, I object, one, as it being totally irrelevant, and, two, as being beyond the capacity of a witness to state such a conclusion.

THE COURT: I don't see any materiality in it, Mr. Richards.

BY MR. RICHARDS:

Q Did you request your bankruptcy counsel to proofs of claim? A On several occasions.

Q And what was their response? A The response was that there was no urgency in doing so, that we had plenty of time to file the claims, and in view of the proceedings in the Cain partnership motion, that it did not have the urgency that I was putting on the [22] matter.

Q And you are aware that I left as counsel with the firm of Myerson and Kuhn at the end of July of 1989; is that correct? A Yes, that's correct; and at that time I spoke to the managing partner of Myerson and Kuhn and requested back my files.

Q And, by way of background, when did the partnerships retain bankruptcy counsel? A Sometime around the middle of June, I believe.

Q And when you retained—you were just answering a question I took out of order. A Sorry.

Q When you asked Myerson and Kuhn to return the Clinton file, what was their response? A That they did not have the file, that it had been packed up and shipped to you at your new firm.

Q And had it, in fact, been packed up and shipped to me? A Well, this went on for several weeks. I spoke to you. You claimed that you did not have the file. I spoke, on numerous occasions to Myerson and Kuhn, who swore up and down that the file had been shipped to you.

And on August 20th, while I was away on [23] vacation, we received a call from Myerson and Kuhn informing us that they had found the file, that it had been in their possession at all times, and that they would send it to us.

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Q And did you eventually receive that? A I received the file, I believe on August 25th.

Q Mr. Berlin, in your capacity as president of the general partner of Robriste and as president of the general partner of Pudding Enterprises, which is a general partner of Fort Ogelthorpe, are the limited partnerships creditors of the estate of Pioneer? A Yes, they are.

MR. RICHARDS: Your Honor, I would ask for a little indulgence just to state the nature of the relationship between the debtor and the partnerships and would ask the Court for a little leeway on that issue.

THE COURT: Well, you ask him your questions. If Mr. Donaldson doesn't like them, he'll let you know.

BY MR. RICHARDS:

Q What was the amount of the partnership's claims?

MR. DONALDSON: Your Honor, I don't mean to interrupt Mr. Richards or Mr. Berlin, but if they've [24] attached proofs of claim that they are attaching the file to the moving papers—I mean, I would say they must speak for themselves as to the—

THE COURT: Well, I will let him state those, for purposes of the record.

MR. RICHARDS: May I approach the witness?

THE COURT: Yes.

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MR. RICHARDS: Let the record reflect that I am handing the witness copies of proofs of claim filed on August 23, without the exhibits annexed thereto.

A (by the witness) In answer to your question, Clinton Associates, limited partnership, is filing a claim for $1,567,650.00; Brunswick Associates, limited partnership, is filing a claim for $2,364,336.00; West Associates is filing a claim for $2,280,031.00; and Thorpe Associates is filing a claim for $730,322.00.

THE COURT: What was the last amount?

THE WITNESS: $730,322.00.

Q And what is the basis of these claims, Mr. Berlin? A The nature of these claims are numerous, including breach of contract and failure to pay certain obligations of the debtor while he was in possession of the [25] property under a master lease from the various partnerships. In each case, each partnership had a master lease with the debtor.

Q These are not duplicate of each of the limited— A No; each one is separate and distinct.

And in three cases there was a subsequent contract dated January 1 of 1988, where the debtor was going to repurchase the properties from the limited partnerships.

Q Mr. Berlin, what would be the consequence if this Court were to deny the partnerships' motion?

MR. DONALDSON: Your Honor, I object to relevancy.

THE COURT: I'll let him answer it.

A As I stated, Mr. Richards, these are limited partnerships. The limited partners have invested substantial funds in these properties and are in danger of losing the properties because of the lack of funds and because of the failure of the contracts to be consummated, of the failure of the debts to be paid, and, in many instances, these limited partners will lose their entire investment.

Q Do you have an opinion as to what would be the consequence to the debtor?

MR. DONALDSON: Your Honor, I'll object to the relevancy of that.

[26] THE COURT: What's the relevancy; how can he respond to that?

MR. RICHARDS: Your Honor,—

THE COURT: Go ahead and respond, if you can, Mr. Berlin.

A I can't say for a certainty how it would affect the debtor other than it is my understanding, based on conversations had, that if our claims were allowed it would still the opinion that the debtor would be able to pay the unsecured creditors a hundred cents on the dollar, a hundred percent plan I think is what they called it. I'm not familiar with bankruptcy terms.

Q Just a few more questions, Mr. Berlin. Did you inquire of the debtor, at any time, the basis of the Turner claim to some three-point-two-million-dollars, and the basis of the Genefin claim of almost one-point-nine-million dollars? A Yes. Those claims—

questions were raised when Mr. Turner was being examined at the hearing.

Q And what was the response of the debtor with respect to that inquiry? A Well, as far as Genefin, we really did not get an answer. We attempted to find out who Genefin was, why the owners or officers and directors were, and what the nature of the debt was; and the debtor at that time was not [27] able to answer the questions and inform us as to the ownership. The only thing that we were informed of was that its address was the same as that of the 100 percent stockholder, of Pioneer Investment Services.

Q And is it correct that the committee has also sought an inquiry as to the basis of these claims? A Yes, it has. As of this date, although Genefin was named as one of the members of the creditors' committee, they have not answered any of the correspondence nor have they appeared at any of the meetings.

MR. RICHARDS: Your Honor, I have no further questions of the witness.

THE COURT: Mr. Donaldson?

MR. DONALDSON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. DONALDSON:

Q Mr. Berlin, I believe you testified you're licensed to practice law in the State of New York and in the State of Florida; is that correct? A That's correct.

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MR. DONALDSON: Your Honor, may I approach the witness?

THE COURT: Yes.

Q Mr. Berlin, I've handed you what purports to be a notice of meeting of creditors in the Pioneer case. [28] Have you had a chance to look at the document? A Yes. I'm familiar with it.

Q How did you gain your familiarity with that document? A It was mailed to us.

Q So when you testified on direct that you received the notice of meeting of creditors, it was the very document, or a copy of the very document that you hold in your hand today? A It appears to be the exact same document; yes, sir.

Q And, presumably, you received this sometime after April 13th but probably within a few days of April the 13th, 1989; correct? A I wouldn't say within a few days; but, I would say we received it prior to the May 5th meeting, yes, sir .

Q Then there would be no issue that no later than May 5, 1989 you had received that document and were familiar with it? A Mr. Donaldson, I would not say I am familiar with it. You mentioned that I am an attorney. I have never taken a course in bankruptcy. I have never even looked at the Bankruptcy Laws. I am totally unfamiliar with them, and I have no knowledge of bankruptcy practice.

[29] So, if you say "familiar with it", I have read the notice, yes, sir.

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Q Well, let me modify my question. Prior to May 5, 1989, you had received the notice and read the notice? A Yes, sir.

Q Now, Mr. Berlin, on that notice does it say thing about a bar date? A Yes, it does.

Q What does it say? A Bar date is August 3, 1989.

Q And immediately above that does it have a statement to the effect that the claim is listed as contingent, disputed, unliquidated, or, as unlisted, you've file a proof of claim? A That's what it says.

Q Now, you are the president of Robriste, is the general partner of Clinton, West Knoxville, and Brunswick? A Correct.

Q And you are the president of Pudding [illegible]prises, which is one of the two general partners of Ogelt[illegible]? A That's correct, also.

Q And prior to May 5, 1989, you, Mark Berlin, received that notice? [30] A I have said that, yes.

MR. DONALDSON: Your Honor, I'd like, for the record, to have that notice marked as an exhibit.

THE COURT: Exhibit 2.

(Exhibit Number 2 received)

BY MR. DONALDSON:

Q Now, Mr. Berlin, you retained either Myerson and Kuhn or

Mr. Rickers, or both, sometime prior to the adjourned meeting of creditors on June the 16th? A That's correct.

Q At the first meeting of creditors, on May the 5th, if I'm not mistaken, you attended in person, by yourself, without counsel? A Right; and you even asked me about that, and I mentioned that I was not there as counsel, that I was here as president and general partner.

Q President of Robriste and president of Pudding? A That's correct.

Q The general partners of all four movants? A Yes, sir.

Q And you appeared in that capacity at that time? A Yes, sir.

[31] Q All right. I read in your affidavit I believe it's Paragraph 9—that you inquired of Mr. Richards as to the time for filing claims, and his reply was that it was not a matter of urgency; correct? A I can't say it was Paragraph 9; but, what you say is correct.

MR. RICHARDS: Your Honor, may I tender the witness a copy of the affidavit?

THE COURT: Well, he's acknowledged the correctness of the statement.

BY MR. DONALDSON:

Q Now, Mr. Berlin, would you say that you made the inquiry of Mr. Richards at or about the time he was retained to represent the

partnerships? A Either then or at the adjourned meeting of creditors.

Q So sometime in the middle part of June, 1989—the 15th, 16th, 17th; somewhere in there—you made that inquiry? A During the month of June, yes.

Q And, as I believe you testified a moment ago, you had placed some urgency on that matter? A Mr. Donaldson, you do not know me, but people who do know that when something has to be done I like it done right away, whether it's due that day or not. I do [32] not like to procrastinate. I like to do things immediately. That's my nature.

Q Is the answer to my question, Mr. Berlin, that you put a matter of urgency on it with Mr. Richards when you made the inquiry? A I told Mr. Richards I would like it filed.

Q What prompted you to tell him that you'd like it filed; was it the fact that you'd read or received Exhibit 2 A No.

Q Do you recall—and, if we need to, we'll get the affidavit out; I don't think we will—do you recall in your affidavit where you say that you had the partnerships' files on the bankruptcy reproduced and given to Mr. Richards? A Again, without the paragraph, the answer is yes.

Q Okay. After the partnerships' files were reproduced, did you still have the partnerships' file? A Do you mean did I have Exhibit Number 2?

Q Yes. A Yes.

Q All right. So, after Mr. Richards was retained and after the file was reproduced, he now has a file, and you now have a file that duplicates his? A That's correct.

[33] Q Okay. When Mr. Richards told you that there was no urgency to filing a proof of claim, did you ask him if he'd made inquiry of any of the other creditors as to when claims had to be filed? A No; I did not ask him that. He was my counsel and I was relying on his expertise.

Q Mr. Berlin, you know a gentleman named Paul Powsner, do you know? A Sure do.

Q You've had numerous business dealings with Mr. Powsner — correct — several? A Business dealings with him? He has acted as my attorney.

Q Okay. Mr. Powsner holds a claim that's listed on the schedules as disputed, contingent and unliquidated, doesn't he? A I believe so; yes, sir.

Q Mr. Powsner is represented by Ms. Herbert, isn't he? A To the best of my knowledge.

Q Did you ever discuss with Mr. Powsner when claims should be filed? A No.

Q Did you ever discuss it with Ms. Herbert? A Did I?

[34] Q Yes. A No.

Q Did you ever ask John Walker, the attorney for the creditors' committee? A No.

Q Did you ever ask Mr. Winchester in any of the meetings that you attended with him, or did your counsel ask Mr. Winchester about the bar date? A I can't speak for my counsel. If you're asking did I, I did not ask anyone, including Mr. Winchester or any other attorney who was at the creditors' committee meeting.

Q Did you ever ask your counsel, pick up Exhibit 2 and say, "What does this mean; 'bar date, August 3, 1989'"? A Mr. Donaldson, up until this whole issue arose I didn't have any idea what a bar date was, in this context.

Q All right, sir. A (continuing) That's not what a bar date would mean to me.

Q All right. Now, during this time period when Mr. Richards left Myerson and Kuhn, and, some issue about getting the file back or not, did you ever offer just to reproduce your file again for him? [35] A I don't remember. I know that I did not reproduce it for him at that time.

Q No. My question was, did a discussion ever come about, either initiated by him or by you, that, "Well, in the interim, while we're trying to get this file from Myerson and Kuhn, I'll either give you mine or I'll duplicate it again"; did that ever happen? A I don't remember ever being asked for the file.

Q All right. Now, the creditors' committee meeting that you attended in August by telephone, which your counsel asked you about, I attended that meeting by telephone, didn't I? A Yes. You and I talked at that meeting.

Q Well, I think I talked with Mr. Walker and everybody else that was present in the room; isn't that correct? A You talked to

everyone; I talked to everyone; and you and I, also, talked to one another.

Q During the course of that meeting you and the gentleman from RP Industries, and Mr. Walker, and others made certain requests for information; correct? A I believe so; yes, sir.

Q Part of that was the Coopers and Lybrand report; correct? [36] A Yes, sir.

Q And isn't it true that the agreement reached at the conclusion of the telephone conversation was that I would write a letter to Mr. Walker, as counsel for the committee, who would act as the central clearinghouse to get the information to the other members? A I don't remember that, as a fact. I do remember that I met with Mr. Hicks, in New York, on another matter; and he had said, once again said, "You're right. I had promised to get it to you and I still haven't, but I will."

Q Well, let me go back to my question. Are you aware of what arrangement Mr. Walker and I have made as far as answering the questions asked during the August 16th meeting and what our arrangements are as to how it's going to be provided and when? A I asked Mr. Walker yesterday whether he had received the financial statements as of this date, and he had told me "no" and that he had expected to have received them.

Q Did he not tell you that he and I had talked the day before and that the letter was being prepared and we were going to send it to him and he said that was fine with him? A He didn't mention that to me at all.

Q Just briefly about the claims; you say that [37] part of the

claims that you're seeking now to file, or, permission now to file, relate to what you call "master leases"; correct? A Yes, sir.

Q Do you know what the term "nonrecourse" means, Mr. Berlin, in legal terms? A Yes, sir.

Q It means that there's no personal obligation—correct—the obligation only extends to the collateral? A In most cases, yes.

Q Isn't it true, Mr. Berlin, that the master leases of which you speak, involving the four partnerships and the debtor, at least on their face by their language are nonrecourse? A On their face, yes, I would say they are nonrecourse.

MR. DONALDSON: I have nothing further, Your Honor.

THE COURT: Exhibit 1 was never filed, which was the four claims. Do you still have those, Mr. Richards?

MR. RICHARDS: With the Court's permission, I have another copy. Those are copies of the proofs of claim, without the exhibits, I think as I noted [38] when I tendered them to Mr. Berlin.

THE COURT: We'll file that as an exhibit.

(Exhibit Number 1 was received)

THE COURT: All right. Anything further from this gentleman?

MR. RICHARDS: Very briefly, Your Honor.

Appendix H

REDIRECT EXAMINATION

BY MR. RICHARDS:

Q Mr. Berlin, you've testified that the schedules originally filed by the debtor on April 18th did not list the partnerships as creditors; is that correct? A That is correct.

Q To the best of your knowledge, what is the amount of the scheduled unsecured debt as reflected on the debtor's amended schedules? A I believe—eight- or nine-million-dollars.

Q And between Mr. Turner and Genefin, they would have claims for approximately how much of that? A In excess of five-million.

Q What were you told by counsel when you inquired as to the immediacy for the filing of proofs of claim?

THE COURT: What counsel?

Q (continuing) By me. I beg your pardon, sir. [39] A You told me that they didn't have to be filed right away, that there was no time in which we had to file the claims, that we did not have to do them immediately.

Q Mr. Donaldson just asked you, Mr. Berlin, briefly about the nature of the relationship between the debtor and the four partnerships; and you testified that the agreements on which the proofs of claim are based have nonrecourse? A Yes.

Q Notwithstanding that provision, what is the basis of your belief that the partnerships nonetheless have claims against this

Appendix H

debtor?

MR. DONALDSON: Your Honor, for the record, as long as he's testifying as to his belief or understanding only, I have no objection.

THE COURT: All right.

A Most of the claims, as they are shown on the proofs of claim, are for monies that were to be paid before the default under the master lease, and for funds that were collected by the debtor even after the default and then not turned over to the partnerships.

Q So, is it your belief that the nonrecourse provision does not bear upon these claims that you've just testified to? A To clarify, what happened, for example, is [40] that rents were collected from tenants: the underlying debt service was not paid; when the master lease was turned back to the partnerships, the statement was made, "Oh, and by the way, the banks are about to foreclose on you because you haven't paid four months' debt"; and that was the first time we had found out that the rents had been collected but that the funds had not been used to pay the debts to the investors who held the mortgages on the property, in three of the four if not in all four.

Q Mr. Berlin, would it be fair to state that if you had realized that the bar date was by August 3rd that the claims would have been timely filed? A If I had known what a bar date was, and had been told by you or by anyone else, be it Mr. Powsner's Counsel, Mr. Winchester, creditors' committee counsel, by Mr. Donaldson, or, if anyone else had said to me, had mentioned an August 3rd filing date, I would have made sure that they had been filed by that date.

MR. RICHARDS: Your Honor, I have no further questions of the witness.

THE COURT: Mr. Donaldson?

MR. DONALDSON: I have no further questions, Your Honor.

THE COURT: Anything further, Mr. Richards?

MR. RICHARDS: Yes, Your Honor, if I may.

[41] THE COURT: Any further proof?

MR. RICHARDS: No, no. I'm sorry; not as to proof. That's correct.

THE COURT: Mr. Donaldson, any proof?

MR. DONALDSON: Only by way of judicial notice, Your Honor, of the claims roster of this Court which shows that Mr. Powsner, who was listed as contingent, unliquidated, disputed, has filed a proof of claim, as has Circuit City. I ask the Court to take judicial notice of that as part of the record.

MR. RICHARDS: Your Honor, I believe I did ask you before, and, I believe you did grant to take notice of the affidavit filed with our movants' motion.

THE COURT: The affidavits are part of the record, under Rule 43. I will consider those affidavits.

Do you have additional argument, Mr. Richards?

MR. RICHARDS: With the Court's permission.

THE COURT: You know, of course, the spot you've got the Court in, and everybody else in this case; you've got multi-million-dollar claims that haven't been filed, where it's obvious, or at least [42] it appears to me to be obvious that notice was received.

MR. RICHARDS: Your Honor, we haven't testified to the contrary; and, certainly, Mr. Donaldson's comments before about the circumstance we find ourselves in is not one in which anybody appears without great reservation.

THE COURT: I want to know, principally which case are you relying on, on the equitable standpoint?

MR. RICHARDS: The equitable standards, Your Honor, we think—Your Honor, let me go several fold. We said in our earlier brief that Rule 3003 is unlike 3002, that the Court does have discretion. Collier, 3305, likewise, calls for discretion in the situation of—

THE COURT: Well, you agree that where we are is 9006?

MR. RICHARDS: I agree that the two of them must be read together; and I believe that the cases that have been interpreted, 3003, on a motion, I believe the file claim out of date. Whether they be Wellming, whether they be McGoric, and American Skate, all of which look to a ground for cause.

And, Your Honor, what's interesting to note, and I will note, that the cases that the debtor relies [43] upon—the Vertientes' case, the Robins' case, and the Safeco case—the three circuit decisions, I think are important to distinguish for several reasons. First of all, in

Robins, the Court remanding, considered that Rule 60(b) considerations would be appropriate for review on remand. Moreover, in Robins we had a grievous situation where the accounts that were filed on behalf—show claimants—they're not filed on behalf of this group. You also have a situation where the bar date was in excess of twelve months after the filing date.

In Vertientes, which is the shortest of all the bar date cases, the time frame, you had the moving creditor moving, I believe it was a year after the date had been set.

I also refer the Court to the Carpen decision, which was cited in the debtor's opposition brief, and which we cite, which Chief Judge Duberstein, again, ruled upon, even after finding an absence of excusable neglect, nonetheless, on an equitable grounds, felt that it still would be harsh and extreme to disallow the filing of a late pleading.

THE COURT: What were the facts in that case?

MR. RICHARDS: Well, the facts—it was not a late-filed claim, but it was a situation where an answer to a pleading, an adversary proceeding, was filed a day late; and [44] the plaintiff moved for the entry of a judgment by default; and the judge, Chief Judge Duberstein, saying,—and I'm reciting on Page 6—"... there are ... considerations this Court must address in determining whether it should enlarge defendant's time to answer. Although plaintiff is entitled to rely on deadlines, fixed by the Bankruptcy Rules of Procedure, defendant is also entitled to have a fair opportunity to be heard and to seek to prove his defenses. By reason of the Court's familiarity with defendant's opposition to the prior motion to turn over the funds, the Court is fully aware the defendant has raised factual questions which are addressed to the Court of the

debtor's intentions. To permit the proceeding to go by default would deprive the defendant of the right to a fair trial. The Bankruptcy Court is a Court of Equity and is required to act with fairness and sympathy, not only to debtors but to other parties as well."

THE COURT: You would agree with me, though, would you not, that a bar date has to have some significance?

MR. RICHARDS: Your Honor, I couldn't agree with you more on that issue; and I've tried—the partnerships have argued before this Court that, (a), that this is not a jurisdictional time frame akin to Bankruptcy Rule 3002, number one, where the Court, finding all the equitable consideration, just not be allowed to in any fashion amend the date. If you [45] had missed the date, you're out of luck. So, in the first instance, you have to distinguish it from that group, from those cases.

The second instance is, what we submit, Your Honor, there are major irregularities, respectfully, in the schedules. There is a perceived incestuous relationship; there is, between certain major creditors, certain other creditors who have been singled out; coupled with that was a disruption, a major disruption, of counsel's practice.

Moreover, Your Honor, the policy considerations, we would submit, warrant the extension here. This Court is all too aware that Chapter 11 re-organization, in general, involves the give-and-take in the compromise between debtors and creditors, under the watchful eye of the Bankruptcy Court for the process to work; and, underpinning the whole process is the ability to negotiate with a full picture and a complete and accurate picture of the debtor's assets and its liabilities.

That's hardly the case here. Not only is there a lack of knowledge as to what the true assets and liabilities are, but, this incestuous relationship, in certain large creditors, certainly belie—along with the irregularities in the schedule—completely belie the confidence in the debtor's statements of its assets and liabilities. This debtor—and, we would submit—has a [46] fiduciary obligation to treat all creditors fairly and equally. Respectfully, we think that it is questionable whether Mr. Turner, as the CEO and the chief operating officer, has acted like the fiduciary and dealt fairly with all creditors.

Judge, if this was something, if this was a motion brought on a year after, or if it were on the eve of confirmation, like in Wellming, it might be a different consideration. The debtor concedes; the debtor concedes that there is no prejudice. The debtor concedes there will be no delay in the administration in the case; and the debtor doesn't deny that it would be a windfall. The debtor doesn't, in any fashion, explain or seek to offer any explanation as to the Turner claim, as to the Genefin claim, and the other situations which cause concern as to the bona fides of the schedules in general.

This creditor has acted in good faith in these proceedings from day one; and, as I said to you, Your Honor, before, under all the circumstances, we think it would be unfair and inequitable to visit the sins of the lawyer on the client.

Now, Your Honor, you asked me a very simple question; isn't a bar date supposed to have some significance. The only answer to that is yes; but, where the Court does have discretion, and where the Court, in its equitable use of that [47] discretion has the ability to extend the date for a modest three weeks, it would not do violence to the entire Chapter 11 proceeding. That's what the partnerships are arguing—besides the fact that Fort Ogelthorpe never even got

notice and never was listed, so, they stand in somewhat of a different situation; but, the other three partnerships knew within three weeks.

My affidavit is before the Court. I will state, under oath, that I have no recollection, until after the fact, of having reviewed that April 13th order; but I will also, by the same token, state categorically that I was remiss in not inquiring when the bar date was. As I stated in the affidavit, I expected that insofar as this was a little bit of a larger case that the bar date would be sometime thereafter; it would not be in three-and-a-half months, which is what it was. As a matter of fact, at the time the Court entered the order, on April 13th, it wasn't until May 25th that the debtor's schedules reflected that Clinton, West Knox, and Brunswick all had contingent, unliquidated, disputed claims.

I'm not suggesting that there wasn't adequate time from the end of May through August 3rd; quite to the contrary. I have not in any fashion sought to couch this any differently, Your Honor, as to the nature of the claims, the magnitude of the claims. This Court still will, nonetheless, have jurisdiction, have to decide about the [48] bona fides of those claims; but I think it's important to know that even in Vertientes, the Third Circuit case, which had the shortest bar date time frame of all the cases, the whole proceeding was confirmed within nine months, obviously as an extreme situation; and, notwithstanding, the creditor chose to wait a year after confirmation to move to file the claim out of time.

In Robins, as I said, it was after twelve months, plus. In Bajan Resorts, the creditor waited almost a full year after the deadline to seek permission to file proof of claim.

THE COURT: Are those cases factually similar, however, in that the creditor was aware?

MR. RICHARDS: Well, the answer to that question is yes, they are similar in that regard. They are similar.

But, by the same token, the creditor was aware in Wellming; and the considerations that this Court—and, I think it's important to note, we haven't stated that Mr. Berlin, on behalf of three of the partnerships, never received notice. He may not have appreciated the consequence of it, but, he stated that he never received—

THE COURT: Well, it's difficult for me to accept the fact that Mr. Berlin, in his capacity in all four of these entities, lived in a vacuum and received notice for [49] three but not for the Fort Ogelthorpe. I have a little bit of difficulty with that, Mr. Richards.

MR. RICHARDS: Well, Fort Ogelthorpe was never listed, never received notice, and that's not disputed; but, he did receive it, personally, on behalf of the other three.

Your Honor, we would submit that we do have discretion. There isn't any prejudice. There won't be any delay. The fact of the bona fides of these claims, which are substantial, will still be a matter for this Court to retain jurisdiction, if and when objections to those claims are filed.

To give the debtor a windfall, in a situation like this—I think what's particularly interesting is the American Skate case. The debtor has sought to distinguish American Skate in its opposition. In American Skate, as I said before, the debtor had listed all but one of its claims contingent, unliquidated, and disputed. The one that was not listed was that of the CEO. All other claims were listed as contingent, unliquidated and disputed.

But, this is not on all fours; but the reasoning, the Court found

in American Skate—and that is—and that is not a factor in either the Vertientes, Safeco, or the Robins' cases—along with the fact that the bar dates were all longer periods—but, the Court did find that that was [50] sufficient cause, in American Skate, and that the finding of the cause was sufficient to allow the Government, which, admittedly, had received notice, and because of an internal filing error had not filed its claim in a timely fashion. That was not disputed; and when the Government moved to file its claim out of time, that fact, coupled with the irregularities in the schedules, was sufficient for the Court to allow, to warrant a finding of cause, to allow the late claims to be filed.

In American Skate, the creditor acted in a prompt fashion. It didn't lay, like Vertientes, for a year after, or some other time. This one, I think this case would be in a far different posture if we waited six months, eight months. This matter was filed three weeks afterwards; and, the case is still new, and, what prejudice—and all those circumstances, the totality of the circumstances in the mosaic, not just one, were sufficient in American Skate to allow the Court to allow the late filing of the claim.

We're asking for no different relief in this case as the Court found in American Skate. Just because all the claims haven't been listed as contingent, unliquidated and disputed, some of the major ones have. Our clients, (a) and (b); the alleged insiders—certainly, Mr. Turner is an insider—and, whatever the truth is about Genefin, and, nobody has come forward to say—including the debtor—to say, "Oh, [51] yes; it's a third-party entity; it's an arm's length transaction." Nobody has made any statement as to that. Those control in excess of 50 percent of the allowed unsecured debt, pursuant to the debtor's amended schedules.

It does raise a question as to Gerrymander—and it should be

sufficient to this Court, for the modest request; and that's all this is, is a modest request.

THE COURT: All right. Thank you, Mr. Richards.

Let me hear from Mr. Donaldson.

MR. DONALDSON: If it please the Court, there's no dispute in this case that Mr. Berlin received the notice, read the notice, prior to May 5th, 1989, by his own admission. As the Court so aptly pointed out, Mr. Berlin is not "Mr. Berlin, President of Robriste", or "Mr. Berlin, President of Pudding"; he is Mr. Berlin, an individual.

Peculiarly enough, Your Honor, a case cited by the movants in their original papers which we have cited in our response is the Terex case, out of the Northern District of Ohio. When an individual receives a notice, which Mr. Berlin admittedly did, he receives it in whatever capacity he may act, whether it's individual, president of a corporation—in the Terex case, executor of an estate. The plain simple fact is, Your Honor, all four partnerships had the notice, had [52] actual notice, some three or so months before the bar date of August 3rd.

Your Honor, the Circuit Courts of Appeals' cases that we have cited, I submit, state the better reason, and what has become to be the majority rule, on what the groundrules are, what applies in a motion such as this. Whereas, here, Your Honor, the claim was filed after the expiration of the bar date. It is governed by the 3003(c) with 9006(b)(2); and 9006(b)(2), Your Honor, requires the movant, in this case the partnerships, to prove excusable neglect.

As the 11th Circuit said some three years ago in the re: South Atlantic case, the only relevant focus and the only relevant inquiry

of a motion such as this is on the actions of counsel and the creditor that move for the extension. The effect on shareholders, other creditors, the debtor, any other equitable considerations, if they ever were a factor, Your Honor, are no longer a factor, under the decisions in South Atlantic, the Maressa v. A. H. Robins' case out of the Fourth Circuit, and in re: Vertientes out of the Third Circuit.

And, Your Honor, although it's on a different aspect of the Code, the recent decision of the United States Supreme Court, in Norwest Bank of Worthington v. Ahlers, which, as everyone knows, dealt with confirmation, [53] one of the arguments advanced in that case were, as characterized by the Supreme Court, various equitable arguments why the Court shouldn't reach a result that seemingly on its face was inequitable; and Mr. Justice Marshall, speaking for the Court, put it very simply, in short, answer to these arguments is that whatever equitable powers remain in the Bankruptcy Courts must and can only be exercised within the confines of the Bankruptcy Code.

Your Honor, that's exactly what the Fourth, 11th, and the Third Circuits have held in the cases I have previously cited; and those Courts readily acknowledge, as I do to Your Honor, that that's a harsh result, but, Your Honor, it's not a result dictated by me. It's not a result dictated by this or any other Court. It's a result dictated by the Bankruptcy Code and the Bankruptcy Rules as enacted by the Congress of the United States; and if it produces a result that's harsh, that just is, unfortunately, the way it is.

There have been many statements made here, Your Honor, about whose fault is this. In the moving papers it's mentioned there was discussions with counsel for the debtor and counsel for the creditors' committee, who said nothing about the bar date. We weren't asked about the bar date. It would seem, although oblique,

that the debtor, in its latest supplement, in its argument, is now saying that maybe it's the court's fault; set a deadline of three-and-a- [54] half months. Fact of the matter is, Your Honor, under Rule 2002, the Court could have set the bar date within twenty days and have been in all respects proper and in compliance with the rules. I don't think the three month, three-and-a-half month bar date is in any way, shape or form relevant.

Your Honor, there have been several allusions to incestuous relationships, and things of the like. My first response to Your Honor is it's not relevant.

Secondly, and more importantly, Your Honor, I will say this. In this case we have a creditors' committee that is represented by Mr. Walker, and I don't need to say anything about Mr. Walker's capabilities to this Court or to any other Court, probably, in the United States. Mr. Winchester sits on that committee. Mr. Sedgley is on that committee, and several other members of the Knoxville Bar. In addition to that, Your Honor sits on this bench as the overseer of this case; and, in addition to that, we have Ms. Foster, Mr. Sonnenburg, and Mr. DuBois. When, on top of that, Your Honor, now we have Mr. Weaver, who is the interim trustee in Mr. Turner's Chapter 7. I submit to the Court that those aims are bona fide. They are based on debentures, that, the Court will find out in subsequent proceedings, are placed in independent third parties not even held by Mr. Turner, and, even if they're held by Mr. Turner now they belong to Weaver, so that I think that that can be best [55] characterized as a desperate attempt by these movants grasping at straws to try to extricate themselves from a predicament in which they've put them.

In conclusion, Your Honor, it very simply gets down to this; the standard if excusable neglect. Your Honor, as unfortunate as it may

seem, I think there's two things that really need to be considered. Number one, these movants have yet, even as we sit here today, to retain local counsel as required by Rule 1 of the United States District Court for the Eastern District of Tennessee Rules; and the significance of that, Your Honor, is—and, that's why I asked that it be put in the record that Ms. Herbert represents Mr. Powsner, who also lives out of this jurisdiction. They filed their proof of claim. They know how bar dates are set in this jurisdiction; and, that certainly is a compelling enough reason to retain local counsel, and again, I suggest, Your Honor, that's another strike against these movants, and Rule 1 of the U.S. District Court for the Eastern District of Tennessee Rules requires that.

Mr. Richards candidly acknowledges, Your Honor, that he did not inquire as to the bar date, and, all the other reasons given that would even approach excusable neglect; but, Your Honor, the failure of counsel to act is not excusable neglect. Excusable neglect, Your Honor, has been defined by the cases we cite, and, generally, as [56] something that is beyond the ability of the party whose duty it was to act to control; and, Your Honor, that has not been shown in this case.

Mr. Richards talks about leaving a law firm and going to another firm. Your Honor, the cases we cite, which are analogous, about businesses where people leave and come and go, have traditionally by the Courts been held not to be excusable neglect.

Your Honor, in the Pegett case, in the Third Circuit, the Three Mile Island nuclear disaster that kept somebody from getting to their office and they missed the bar date was held not to be excusable neglect.

And the claim about the changing of firms, Your Honor, it is undercut totally by the fact that at all times, Mr. Berlin admits from

the stand, he had the duplicate of the file. They discussed it back and forth.

And, as harsh as it may seem, Your Honor, I submit to the Court that there is one result and one result only to be reached in this case, and, respectfully, that is that this motion must be denied. Thank you.

THE COURT: Mr. Richards?

MR. RICHARDS: With all due respect, the equitable argument that counsel argues in the Ahlers' case, and even in the Hanson cited in the debtor's brief, stem from the proposition that the Court's equitable powers are limited [57] to the extent that they are not in conflict with an existing rule or an existing Bankruptcy Rule or by an existing provision of the Codes. So, clearly, in this situation, where, as I said, we think the obvious one, under Section 365 (d)(4), that the debtor has not moved in a timely fashion to extend the time to assume or reject, whatever the reason, the lease is—for noncommercial property—the lease is deemed rejected, no matter what equitable considerations; and under a situation like that, the case law has developed and says that the Court is without discretion, without the equitable power to extend that time, no matter how good the underlying reasons would be.

This is not such a situation; and, I repeat, it is not such a situation, where the Court is barred and precluded from doing so. The debtor states that the equitable considerations are exceptionally irrelevant. This is an issue where we disagree, very vigorously, that, equitable considerations are not irrelevant. I've set forth what those equitable considerations are—the delay, the lack of prejudice, et cetera,—all of which militate in favor—the disruption of counsel's practice. This is not a mere situation of going across the street to change jobs and things of that nature. It is

quite to the contrary. Things were very trying, and—well, I don't want to say further about that.

[58] But, also, the issue as to retention of counsel is, likewise, a straw issue. The partnerships had no intent of appearing here in legal proceedings, and, therefore, did not retain local counsel. If, in fact, they were to do so—if, in fact, they were to do so beforehand, they would have retained local counsel, and if any further proceeding is before this Court the partnerships would retain local counsel, consistent with the rules.

Before the filing of this motion the proceedings that the partnerships took part in were merely the adjourned 341 meeting and creditors' committee meetings; and there's no requirement to retain local counsel under those circumstances. In the benefit of 20-20 hindsight, clearly it would have been wiser to have done so; but, I might also add, as long as Mr. Donaldson has thrown Mr. Powsner's name out, Mr. Powsner did not know of the August 3 bar date, either. Counsel did, and counsel filed it. But, that's irrelevant. The point was, Mr. Powsner is also involved in litigation with the debtor down here, and that is one of the reasons for his retention of local counsel. So, to try to analogize the two is, I believe, a deadend.

I asked the Court before—the Court's inquiry of me has put the Court in an awkward position. I appreciate that. I think that the equitable considerations of this Court is not handcuffed. I think that the distinctions— [59] and, I certainly—let me make it very clear—did not mean to suggest anything to the contrary in the fact that the bar date, the time frame for the bar date in this case is shorter rather than longer, and I certainly was not meaning to suggest, as Mr. Donaldson obliquely stated, that perhaps it was the Court's fault. That was not the intent. I perfectly concede that in a smaller, less complicated case, where the assets are smaller—and, this is

straightforward—I'm sure a bar date of this nature is entirely appropriate and proper in all regards; but, nobody has suggested that this would do great violence to the entire system, to allow the partnerships the ability to file their proofs of claim three weeks late; and, as I stated earlier, the foul-up I can't lay to the clients' shoes because it really is probably mine, but, the lack of prejudice, and, under the totality of all the circumstances, under 3003, as read along with 9006, would be, we would submit, inherently inequitable to visit the sins on the client for this situation, and we would respectfully request that the Court, in the exercise of its discretion, I allow the partnerships to file their proofs of claim late.

THE COURT: All right. Thank you, Mr. Richards. You've been most candid with the Court throughout these proceedings.

I'll take these matters under advisement, as in all matters that come up with considerable [60] importance both to the debtor and the moving parties.

Anything else in the Pioneer case?

(no response)

THE COURT: I'll get a decision out as quickly as possible.

(Whereupon, court was adjourned)

[61]

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Appendix H

REPORTER'S CERTIFICATE

STATE OF TENNESSEE:
COUNTY OF KNOX:

I, Carolyn C. DeWick, Professional Court Reporter and Notary Public at Large, do hereby certify that I reported in computer shorthand the foregoing TRANSCRIPT OF PROCEEDINGS, Pages 1 through 60, in re: PIONEER INVESTMENT SERVICES, INC., Debtor, NO. 3-89-01058, Chapter 11, on 14 September 1989, and that the foregoing is a true and correct transcript of my computer shorthand notes.

Witness my hand and official seal this the 14th day of September, 1989.

Carolyn C. DeWick Professional
Court Reporter and Notary Public
at Large
Commission Expires 24 MAR 1992

APPENDIX I — MEMORANDUM ON MOTION TO EXTEND TIME TO FILE PROOFS OF CLAIM OR TO ALLOW FILING OF PROOFS OF CLAIM NUNC PRO TUNC FILED OCTOBER 10, 1989

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE

In re

Case No, 3-89-01058

PIONEER INVESTMENT SERVICES COMPANY a/k/a
PREMIERE RESTAURANT INVESTMENT COMPANY

Debtor

MEMORANDUM ON MOTION TO EXTEND TIME TO FILE PROOFS OF CLAIM OR TO ALLOW FILING OF PROOFS OF CLAIM NUNC PRO TUNC

APPEARANCES:

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Partnership

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Unsecured Creditors

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

The court has before it a motion filed August 23, 1989, by four unsecured creditors, Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership, and Ft. Oglethorpe Associates Limited Partnership (Clinton, West Knoxville, Brunswick, and Ft. Oglethorpe or, collectively, the Partnerships). By their motion, the Partnerships seek an order extending the bar date for filing proofs of Claim. Alternatively, the Partnerships request the court to allow the filing of their claims nunc pro tunc as of the claims bar date. The debtor opposes the relief sought by the Partnerships. The committee of unsecured creditors advised the court by a letter from its counsel received September 19, 1989, that it takes no position on the motion.

In its resolution of the issues, the court has considered supporting affidavits filed by the Partnerships together with oral

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testimony introduced at a hearing held September 14, 1989.[1] Additionally, the Court takes judicial notice of material facts of record in the debtor's bankruptcy case file.

This is a core proceeding. 28 U.S.C.A. ss 157(b)(2)(A) and (0) (West Supp. 1989).

I

The debtor filed its voluntary petition under Chapter 11 of title 11 of the United States Code on April 12, 1989. Contemporaneously therewith it filed a list of its twenty largest unsecured creditors. Included within this list are Clinton, West Knoxville, and Brunswick. The debtor requested and was granted extensions through May 17, 1989, within which to file its statement of affairs and schedules.

On April 13, 1989, a Notice For Meeting Of Creditors (Notice) was mailed by the clerk's office to parties in interest fixing May 5, 1989, as the date for the creditors' meeting required under Bankruptcy ss 341(a). This Notice also fixed August 3, 1989, as the bar date for filing proofs of claim. Concerning the claims bar date, the Notice provides:

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1. Fed. R. Civ. P. 43, incorporated into ed. R. Bankr. P. 9017, provides in material part:

> (e) Evidence on Motions.
> When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

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> You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 USC Sec 1111 Bankruptcy rule 3003. Bar date is August 3, 1989.

Mark A. Berlin, president of Robriste Enterprises, Inc., general partner of Clinton, West Knoxville and Brunswick, and president of Pudding Enterprises, Inc., general partner of Ft. Oglethorpe, received and read the April 13, 1989 Notice.[2] The Partnerships do not dispute the timely receipt of the Notice by Mr. Berlin nor do they dispute that Clinton, West Knoxville, and Brunswick had notice of the filing of the debtor's Chapter 11 petition. Ft. Oglethorpe, however, contends that it did not receive the April 13, 1989 Notice and that it did not, therefore, have notice of the August 3, 1989 claims bar date.

Mr. Berlin attended and participated in the May 5, 1989 meeting of creditors.[3] He also attended adjourned meetings of

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2. Mr. Berlin is engaged in the business of real estate and financial management. He is an attorney licensed to practice in Florida and New York and is also a certified public accountant. He testified that he read the Notice upon receipt, but that he has no familiarity with bankruptcy law.

3. The record is unclear as to whether the May 5, 1989 meeting of creditors was ever held. A "Notice of Rescheduling Of Meeting Of Creditors" dated May 3, 1989, was filed by the debtor's attorneys on May 5, 1989. This notice reflects a rescheduling of the May 5 meeting to May 19, 1989. However, Mr. Berlin in an affidavit accompanying the Partnerships' motion states:

> I attended the first scheduled 341(a) meeting in Knoxville on May 5. I participated in the examination of the debtor and noted for the record, along with the U.S. Trustee, the

(Cont'd)

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creditors held May 19 and June 16, 1989. The Proceeding Memo filed by the United States Trustee subsequent to the May 19, 1989 creditors meeting evidences that Mr. Berlin entered an appearance in behalf of each of the Partnerships. The June 16, 1989 adjourned meeting was attended by Mr. Berlin and the Partnerships' attorney, Marc Richards.[4]

The debtor filed its statement of financial affairs and schedules on May 18, 1989. The Partnerships are not listed on the schedules as originally filed. However, on May 25, 1989, the debtor amended its schedules to include Clinton, West Knoxville, and Brunswick as creditors holding contingent, unliquidated, and disputed claims. Ft. Oglethorpe is not scheduled as a creditor.

The debtor's schedules, as amended, list fifteen secured creditors holding claims undisputed in amount $34,290,078.26. Two secured creditors, Paul D. Powsner and Banque Worms, are scheduled as holding contingent, unliquidated, and disputed

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(Cont'd)

> futility of continuing the Debtor's examination in light of the incompleteness of the debtor's schedules and statement of affairs . . . . The Section 341(a) meeting was adjourned by the U.S. trustee until June 16, 1989.

Although the United States Trustee did not file a Proceeding Memo evidencing the conduct of a meeting of creditors on may 5, 1989, the court concludes from Mr. Berlin's affidavit that a meeting was held.

4. According to the Proceeding Memo filed by the United States Trustee, Mr. Richards' appearance at the June 16, 1989 adjourned meeting was entered on behalf of Clinton. Mr. Richards also filed a written "Notice of Appearance And Request To Receive Notices" with the clerk's office on June 19, 1989, confirming his representation of Clinton. Affidavits filed by Berlin and Richards evidence Richards' representation of all four Partnerships.

claims. The debtor does not assign amounts to these disputed claims. Paul D. Powsner filed a claim on May 16, 1989, in the amount of $609,000.

The debtor scheduled eighty-two Creditors holding priority and general unsecured claims totalling $9,512,903.89. Twenty-two of these creditors are scheduled as holding priority claims totalling $508,827.43; sixty creditors are scheduled as holding general unsecured claims totalling $9,004,076.46. Claims of five of the general unsecured creditors, including Clinton, West Knoxville and Brunswick, are unscheduled as to amount and are scheduled by the debtor as contingent, unliquidated, and disputed. Circuit City Stores, Inc., a creditor scheduled as holding a disputed claim, filed a proof of claim on August 2, 1989, in the amount of $2,300,000.

On June 5, 1989, the United States Trustee filed his "Appointment of Committee of Unsecured Creditors" designating, inter alia, Clinton as a member of the creditors' committee. Mr. Berlin, representing Clinton, has served as a member of this committee since its inception.

The Partnerships retained the legal services of Marc Richards, an experienced bankruptcy practitioner,[5] prior to the June 16, 1989 adjourned meeting of Creditors. Concerning Richards' retention, Mr. Berlin, in his affidavit, states:

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5. Mr. Richards states in his affidavit that he has practiced bankruptcy law for more than seven years and that "I have participated in some of the larger bankruptcy cases across the country including: Baldwin-United, LTV, Braniff Airlines, Tacoma Boat Building, Family Health Plans a/k/a Mexicare Health Plans, DRW Realty, Wilson Foods and Spector Red Ball."

> [T]he Partnerships retained Mr. Richards as bankruptcy counsel in mid-June, 1989. At that time, I had [the] Partnerships' bankruptcy file reproduced and given to Mr. Richards. I also inquired as to the timing for filing the Partnerships' proofs of claim. Richards advised me that as there was no bar date, that the filing of the Partnerships' proofs of claim was not a matter of urgency.

Mr. Berlin's testimony at the September 14, 1989 hearing on the Partnerships' motion is consistent with his affidavit and is not disputed by Mr. Richards.

On August 23, 1989, twenty days after expiration of the August 3, 1989 claims bar date, the Partnerships filed their proofs of claim. These claims are signed on behalf of Clinton, West Knoxville, and Brunswick by "Mark A. Berlin, President Robriste Enterprises, Inc. (General Partner)." The claim filed on behalf of Ft. Oglethorpe is signed by "Mark A. Berlin, President Pudding Enterprises, Incorporated (General Partner)." The claims are filed in the following amounts: Clinton — $1,567,650; Brunswick — $2,364,336; West Knoxville — $2,280,831; and Ft. Oglethorpe — $730,322.

The Partnerships acknowledge that their claims were filed beyond the August 3, 1989 bar date. They contend, however, that the bar date should be extended or, alternatively, that their claims filed August 23, 1989, should be allowed nunc pro tunc to August 3, 1989.

II

Bankruptcy Code 1111(a) provides:

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> (a) A proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated.

11 U.S.C.A ss 1111(a) (West 1979).

Bankruptcy Rule 3003(c) provides in material part:

> (c) Filing proof of claim
>
> * * *
>
> (2) Who must file. Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule: any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.
>
> (3) Time for filing. The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed.

Fed. R. Bankr. P. 3003(c).

Bankruptcy Rule 3003(c)(2) mandates the filing of proofs of claim by creditors scheduled by the debtor as holding "disputed,

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contingent or unliquidated" claims. Rule 3003(c)(3) directs the court to fix a bar date for filing claims, but permits the court to extend the bar date for "cause shown".

Bankruptcy Rule 3003(c)(3) must be read in conjunction with Bankruptcy Rule 9006(b). *Vertientes, Ltd. v. Internor Trade, Inc. (In re Vertientes, Ltd.)*, 845 F.2d 57, 60 (3rd Cir. 1988); *Biscayne 21 Condominium Assoc., Inc. v. South Atlantic Financial Corp. (In re South Atlantic Financial Corp.)*, 767 F.2d 814, 817 (11th Cir. 1985); *Dix v. Johnson (In re Dix)*, 95 B.R. 134, 137 (9th Cir. BAP 1988).

Bankruptcy Rule 9006(b)(1) provides:

> (b) Enlargement
>
> (1) In General. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of *excusable neglect*.

Fed. R. Bankr. P. 9006(b)(1) (emphasis added).

Paragraphs (2) and (3) of Rule 9006(b) refer to Rules under

which the court has no discretion to extend time or can extend it only within the limits imposed in those Rules. Rule 3003 is not within the exceptions provided in these paragraphs. "[U]nder Rule 9006(b)(1) a bankruptcy court does have discretion to extend time to file a proof of claim, but only under the circumstances set forth in the two situations described in the Rule." *In re Vertientes, Ltd.*, 845 F.2d at 59.

The term "excusable neglect" is not defined in the Bankruptcy Code. In *In re South Atlantic Financial Corp.*, the Eleventh Circuit stated:

> Courts have interpreted "excusable neglect" under Rule 9006(b) and its identically worded predecessor, Rule 906(b), as requiring the movant to show that " 'the failure to timely perform a duty was due to circumstances which were beyond the reasonable Control of the person whose duty it was to perform.' " *In re Gem Rail Corp.*, 12 B.R. 929, 931 (Bankr. E.D. Pa. 1981) (quoting *In re Manning*, 4 B.C.D. 304, 305 (D. Conn. 1978). Thus, in *In re Underground Utility Construction Co.*, 35 B.R. 588 (Bankr. S.D. Fla. 1983), the court held that a creditor had failed to show "excusable neglect" for filing his claim three days after the bar date where the untimely filing was the result of his failure to mail his claim to the proper address. Similarly, in *In re Oakton Beach and Tennis Club Real Estate Limited Partnership*, 9 B.R. 201 (Bankr. E.D. Wisc. 1981), the court held that counsel's reliance on misinformation from a bankruptcy court clerk regarding his duty to file a proof of claim did not amount to excusable

> neglect; *see also In re Horn Construction a& Maintenance, Inc.*, 32 B.R. 87 (Bankr. S.D. Ala. 1983, ("misunderstanding" between a creditor and its lawyers which caused its late filing of a proof of claim did not amount to "excusable neglect.") *In re Gem Rail Corp.*, 12 B.R. 929, 931 (Bankr. E.D. Pa. 1981) (creditor's failure to file timely proof of claim was not excusable neglect where there was no showing by creditor that records could not easily have been obtained). Courts have been most willing to find excusable neglect where the movant failed to comply with the bar date because, through no fault of its own, it had no notice of that date. *See e.g., In re Loveridge*, 2 B.C.D. 1957 (Bankr. D. Conn. 1977).

767 F.2d at 817-818.

The Sixth Circuit has not construed "excusable neglect" under Bankruptcy Rule 9006(b),[6] It has, however, in commenting on Fed. R. Civ. P. 6(b), upon which Rule 9006(b) is patterned, observed:[7]

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6. In a case construing Bankruptcy Rule 906(b), the predecessor to Rule 9006 (b), the Sixth Circuit found that "[n]onreceipt [of a notice of the claims bar date by the creditor or his attorney] is sufficient ground for excusable neglect." *Bratton v. The Yoder Co. In re Yoder Co.*), 758 F.2d 1114, 1121 (6th Cir. 1985) the facts of *In re Yoder* are clearly inapposite to those confronting the court in the instant proceeding.

7. Fed. R. Civ. P. 6(b) provides:

Rule 6. Time

(Cont'd)

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> [Rule 6(b)(2)] would seem to be designed to afford relief to a party whose failure to take timely required steps might be properly classified as "excusable neglect."

Anderson v. Yungkau, 153 F.2d 685, 687 (6th Cir. 1946), *aff'd* 67 S.Ct. 428 (1947).

District Judge Neese of this district, in denying a late-filed motion by a plaintiff seeking additional time to respond to a motion for summary judgment, stated:

> The plaintiff was required to have submitted any response to the defendant's motion within 5 days after the service thereof. Local Rule 12(b). He could have obtained readily an enlargement of this period had he sought the same within the 5-day period, Rule 6(b)(l), Federal Rules of Civil Procedure; however, because of his failure to do so, this Court can only grant an extension of time

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(Cont'd)

(b) Enlargement. When by these rules or by a notice given hereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . . .

Rule 6(b)(2) has remained substantially unchanged since 1946.

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> within which to respond to the defendant's motion upon a showing of excusable neglect. Rule 6(b)(2), Federal Rules of Civil Procedure . . . . "[Counsel] should not expect an application under Rule 6(b)(2) to be granted when *failure to act was due to simple inadvertence or a mistake regarding the content of the rules or unfamiliarity with them* . . . ." 4 Wright & Miller, Federal Practice and Procedure 622, ss 1165.

Sherrod v. Piedmont Aviation, Inc., 516 F.Supp. 39, 41 n.1 (E.D. Tenn. 1978) (emphasis added).

Bankruptcy Judge Speer, commenting on excusable neglect within the context of former Bankruptcy Rule 906(b), observed:

> Under this rule, the Court may, at its discretion, permit a party to perform an act subsequent to the specified term in which it must otherwise be done if the party can show that the failure to do the act within the time was the result of excuseable [sic] neglect. Although the determination as to whether or not excuseable [sic] neglect is present must be made on a case-by-case basis, it is generally held that if the delay resulted from factors which were within the control of the delinquent party, then the failure is not the result of excuseable [sic] neglect. *Beneficial Finance Company of Hartford v. Manning (Matter of Manning)*, 4 B.C.D. 304 (Bkcy. D. Conn. 1978), *In re Grethen*, 14 B.R. 221 (Bkcy. N.D. Iowa 1981).

In re Schotz, 57 B.R. 259, 261-62 (Bankr. N.D. Ohio 1986).

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Clinton, West Knoxville, and Brunswick acknowledge receipt of the April 13, 1989 notice in ample time to file claims prior to the August 3, 1989 bar date. Further, Marc Richards, counsel for the Partnerships, and Mark Berlin attended Creditors' meetings held far in advance of the bar date. Mr. Berlin testified that the Partnerships relied upon Counsel to protect their interests; that counsel was provided a copy of the Partnership' bankruptcy file; and that counsel advised him that the filing of claims was "not a matter of urgency." Mr. Berlin, an attorney and certified public accountant, is an experienced businessman and Mr. Richards is an experienced bankruptcy attorney. This court, on the record before it, cannot find that the failure of Clinton, West Knoxville, and Brunswick to file claims prior to expiration of the bar date was "due to circumstances . . . beyond [their] reasonable control." *In re South Atlantic Financial Corp.*, 767 F.2d at 817 (quoting *In re Manning*, 4 B.C.D. 304, 305 (D. Conn. 1978)).

Ft. Oglethorpe cannot successfully contend it did not also receive notice of the debtor's Chapter 11 case in time to permit it to file a claim. Mr. Berlin received the April 13, 1989 Notice. He cannot close his eyes to the fact that he is also president of Pudding Enterprises, Inc., general partner of Ft. Oglethorpe. More conclusively, Mr. Berlin appeared on behalf of Ft. Oglethorpe at the adjourned meeting of creditors held May 19, 1989, and employed counsel to represent it in mid-June, 1989. Ft. Oglethorpe's failure to timely file a proof of claim is not excused by the fact that a separate Notice addressed to it was not received by Mr. Berlin. *See In re Terex Corp.*, 45 B.R. 290, 293 (Bankr. N.D. Ohio 1985) (widow who received notice individually deemed also to have received notice in capacity as executrix of deceased husband's estate).

The Partnerships have not established that their failure to

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timely file proofs of claim is the result of "excusable neglect" under Bankruptcy Rule 9006(b)(1).

III

The Partnerships urge the court to grant their motion on general grounds of equity. They aver that an extension of the bar date will in no way prejudice the debtor; that such an extension will not adversely affect the administration of the estate; that there are irregularities in the debtor's schedules; that the delay in filing the Partnerships' proofs of Claim was occasioned in part by counsel's withdrawal from his prior law firm;[8] and that the Partnerships have participated in the debtor's Chapter 11 case since its inception.

This court is aware that some courts have examined the prejudicial effect of a late filing in determining the existence of "excusable neglect." *See e.g., In re Four Seasons Security Laws Litigation* 493 F.2d 1288, 1290-91 (10th Cir. 1974) (contruing excusable neglect under Fed. R. Civ. P. 6(b)(2)); *Dix v. Johnson (In re Dix)*, 95 B.R. 134, 138 (9th Cir. BAP 1988) (applying a liberal definition of excusable neglect under Bankruptcy Rule 9006(b)(1) which factors in equitable considerations); *In re O.P.M. Leasing Services, Inc.*, 35 B.R. 854, 866 (Bankr. S.D.N.Y. 1983) (construing excusable neglect under Bankruptcy Rule 9006(b)(1)).

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8. Marc Richards, in his affidavit, states that he was employed by the law firm of Myerson & Kuhn until July 31, 1989; that he and three other partners and associates of Myerson & Kuhn resigned from that firm because of disputes and differences with the remaining partners; that from mid-July through the end of the month his attention was largely diverted in seeking to negotiate an amicable withdrawal from Myerson & Kuhn; and that prior to and after his resignation he was unable to obtain access to the Partnerships' files.

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This court, however, is persuaded that the better authority is established in opinions out of the United States Courts of Appeal for the Third, Fourth and Eleventh Circuits.

The Third Circuit in *In re Vertientes, Ltd.*, stated:

> [U]nder Rule 9006(b)(1), a bankruptcy court does have discretion to extend time to file a proof of claim, but only under the circumstances set forth in the two situations described in the Rule.
>
> * * *
>
> Rule 3003(c)(3) must be read in conjunction with Rule 9006(b). Under these Rules, the bankruptcy court's discretion to extend time is limited to two situations — requesets [sic] made before the expiration of the originally prescribed time limitation, and where failure to act was due to excusable neglect. *The court has no discretion to grant an extension simply because no prejudice would result, or for any other equitable reason.*

845 F.2d at 59-60 (citations omitted (emphasis added).

The Eleventh Circuit is in accord that the focus of "excusable neglect" under Bankruptcy Rule 9006(b)(1) "is on the movant's actions and the reasons for those actions, not on the effect that the extension might have on the other parties' positions." *In re South Atlantic Financial Corp.*, 767 F.2d at 819.

The Sixth Circuit in *Anderson* and Judge Neese in *Sherrod, supra*, discuss "excusable neglect" under Fed. R. Civ. P. 6(b)

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within the context of the moving parties' "failure to act". There is no hint that either court was willing to go beyond the clear language of the Rule to consider factors other than the movant's actions. For this court to grant the Partnerships' motion, it would need to ignore the language of Rule 9006(b)(1) which authorizes an extension of time "on motion made after the expiration of the specified period . . . where the *failure to act* was the result of excusable neglect." (emphasis added).

The court believes the construction afforded Bankruptcy Rule 9006(b)(1) by the Third, Fourth, and Eleventh Circuits to be logically consistent with the plain meaning of the Rule. It further believes the Sixth Circuit's statements in Anderson and the district court's statements in Sherrod compel a similar construction of Rule 9006(b)(1) by this Court.

Notwithstanding that this court's sympathies may lie with the Partnerships, it cannot judicially expand Rule 9006(b)(1) to add a ground for extending the time to perform an act within a specified period based upon general equitable considerations. The United States Supreme Court recently stated that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, ____ 108 S.Ct. 963, 968-9, 99 L.Ed.2d 169, 179 (1988). This court is bound by this principle.

For the reasons set forth herein, the court cannot extend the bar date for filing proofs of claim by the Partnerships nor can it enter an order allowing the filing of the Partnerships' claims nunc pro tunc to the August 3, 1989 claims bar date. The Partnerships' motion will be denied.

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This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052. An appropriate order will be entered.

FILED: October 10, 1989.

BY THE COURT

RICHARD STAIR, JR.
United States Bankruptcy Judge

APPENDIX J — ORDER OF THE UNITED STATES BANKRUPTCY COURT DENYING RESPONDENT'S MOTION TO EXTEND THE TIME TO FILE PROOFS OF CLAIM FILED OCTOBER 26, 1989

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

Case No. 3-89-01058

In re

PIONEER INVESTMENT SERVICES COMPANY a/k/a PREMIERE RESTAURANT INVESTMENT COMPANY

Debtor

ORDER

For the reasons set forth in the "Memorandum On Motion To Extend Time To File Proofs Of Claim Or To Allow Filing Of Proofs Of Claim Nunc Pro Tunc" filed this date, the motion filed August 23, 1989, by Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership, and Ft. Oglethorpe Associates Limited Partnership seeking an extension of time to file proofs of claim or, alternatively, to allow the filing of proofs of claim nunc pro tunc, is DENIED.

SO ORDERED.

ENTER: October 10, 1989

BY THE COURT

RICHARD STAIR, JR.
United States Bankruptcy Judge

APPENDIX K — COMPLAINT FILED BY RESPONDENTS AGAINST FORMER COUNSEL IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK FILED OCTOBER 26, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
89 Civ. 7163

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP and WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP,

Plaintiffs,

-against-

MYERSON & KUHN, a New York Law Partnership, and ROBERT P. BEDELL, J. LAWRENCE BLADES, HERBERT BOCKSTEIN, EDGAR H. BOOTH, STEPHEN J. CABOT, FRANKLIN CIACCIO, LLOYD S. CLAREMAN, JOHN F. COONEY, DANIEL JAMES COOPER, ALLAN M. DABROW, MICHAEL C. DURNEY, GERALD A. EPPNER, ROBERT V. GAULIN, ALAN M. GELB, KENNETH R. GILBERG, RICHARD S. GREEN, GREGOR F. GREGORICH, ALBERT HALPRIN, MICHAEL J. HOROWITZ, WILLIAM L. KANDEL, PHILIP SCOTT KAUFMAN, BOWIE K. KUHN, HARVEY A. LEVIN, LEON C. MARCUS, CLAUDE D. MONTGOMERY, HARVEY D. MYERSON, DENNIS OAKES, LAWRENCE H. PANITZ, TODD S. PICKARD, PHILIP PIERCE, THOMAS J. RALEIGH, ARTHUR H. RUEGGER, MARK E. SEGALL, MICHAEL I. SMITH, DOUGLAS STAHL, JULIUS M. STEINER, SAMUEL B.

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STERRETT, ROBIN S. WEINSTEIN, FAITH RYAN WHITTLESEY, PETER D. WOLFSON, JOSEPH ZELMANOVITZ, MARY S. ZITWER, and JOHN DOE and JANE DOE Nos. 1 through 30, individually and as co-partners of Myerson & Kuhn, MILGRIM THOMAJAN & LEE P.C., a New York Professional Corporation, and MARC E. RICHARDS, Individually and as Former Member of Myerson & Kuhn, and as a Present Member of and Shareholder in Milgrim Thomajan & Lee P.C.,

Defendants.

COMPLAINT
PLAINTIFFS DEMAND A JURY TRIAL

Plaintiffs, by their attorney, Lansing R. Palmer, Esq , for their complaint against the defendants, allege:

The Parties

1. Plaintiff Brunswick Associates Limited Partnership ("Brunswick") is a limited partnership organized under the laws of the State of Connecticut. The general partner of Brunswick is Robriste Enterprises, Inc ("Robriste"), a corporation duly organized and existing under the laws of the State of Florida, having its principal place of business at 915 Middle River Drive, Fort Lauderdale, Florida 33304.

2. Plaintiff Clinton Associates Limited Partnership ("Clinton") is a limited partnership organized under the laws of the State of Tennessee. Robriste is the general partner of Clinton.

3. Plaintiff Ft. Oglethorpe Associates Limited Partnership

("Ft. Oglethorpe") is a limited partnership organized under the laws of the State of Connecticut. The general partners of Ft. Oglethorpe are Pudding Enterprises, Incorporated ("Pudding"), a corporation organized and existing under the laws of the State of Florida, having its principal place of business at 915 Middle River Drive, Fort Lauderdale, Florida 33304, and Kenneth G. Puttick ("Puttick"), who is a citizen of the State of Florida and who resides at 1986 Windward Way, Vero Beach, Florida 32963.

4. Plaintiff West Knoxville Associates Limited Partnership ("West Knoxville") is a limited partnership organized under the laws of the State of Connecticut. Robriste is the general partner of West Knoxville.

5. On information and belief, defendant Myerson & Kuhn ("M&K") is a partnership duly organized and existing under the laws of the State of New York for the practice of law, having its principal office at 237 Park Avenue, New York, New York 10017.

6. On information and belief, defendants Robert P. Bedell, J. Lawrence Blades, Herbert Bockstein, Edgar H. Booth, Stephen J. Cabot, Franklin Ciaccio, Lloyd S. Clareman, John F. Cooney, Daniel James Cooper, Allan M. Dabrow, Michael C. Durney, Gerald A. Eppner, Robert V. Gaulin, Alan M. Gelb, Kenneth R. Gilberg, Richard S. Green, Gregor F. Gregorich, Albert Halprin, Michael J. Horowitz, William L. Kandel, Philip Scott Kaufman, Bowie R. Kuhn, Harvey A. Levin, Leon C. Marcus, Claude D. Montgomery, Harvey D. Myerson, Dennis Oakes, Lawrence H. Panitz, Todd F. Pickard, Philip Pierce, Thomas J. Raleigh, Arthur H. Ruegger, Mark E. Segall, Michael I. Smith, Douglas Stahl, Julius M. Steiner, Samuel B. Sterrett, Robin S. Weinstein, Faith Ryan Whittlesey, Peter D. Wolfson, Joseph Zelmanovitz, Mary S. Zitwer, and John Doe and Jane Doe Nos. 1 through 30, whose identities are

presently unknown to plaintiffs, are or were members of M&K during the period from June through August 1989, and are citizens and residents either of the States of New York, New Jersey, Connecticut, Pennsylvania or the District of Columbia.

7. On information and belief, defendant Milgrim Thomajan & Lee P.C. ("MT&L") is a Professional Corporation organized and existing under the laws of the State of New York for the practice of law, having its principal office located at 53 Wall Street, New York, New York 10005.

8. On information and belief, defendant Marc E. Richards ("Richards") is a citizen and resident of the State of New York, who resides at 1725 York Avenue, New York, New York 10128.

Jurisdiction and Venue

9. Plaintiffs' general partners are citizens of Florida, and on information and belief, defendants are citizens either of New York or states other than Florida and, in the case of MT&L, is incorporated and has its principal place of business in the State of New York.

10. The matter in controversy exceeds, exclusive of interest and costs, the sum of $50,000.

11. Jurisdiction of this Court is based on diversity of citizenship and amount (28 U.S.C. § 1332) and principles of pendent jurisdiction.

12. Venue in this district is proper pursuant to 28 U.S.C. § 1391(a) in that jurisdiction is founded on diversity of citizenship, and defendants either reside in this district or the claims arose in this

district, or both.

Facts Common To All Causes Of Action

13. On April 12, 1989, Pioneer Investment Services Company ("PISCO"), a Delaware corporation doing business in Tennessee, filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court, Eastern District of Tennessee (Northern Division), which was assigned Case No. 3-89-01058 (Richard Stair, Jr., U.S.B.J.)(the "Bankruptcy Proceeding").

14. This action arises out of the failure by one or more of Richards, M&K and MT&L timely to file proofs of claim on behalf of plaintiffs in the aggregate amount of $6,943,139 against PISCO'S estate in the Bankruptcy Proceeding. On information and belief, the liability of the individual members of M&K, other than Richards, is derivative only.

15. Clinton, Ft. Oglethorpe and West Knoxville were parties to separate real estate purchase agreements with PISCO each dated January 1, 1988. Pursuant to these agreements, PISCO undertook to purchase shopping centers in Tennessee and Georgia. PISCO subsequently breached each of these agreements by failing and refusing to consummate the sales.

16. As a result of the foregoing, Clinton, Ft. Oglethorpe and West Knoxville suffered damages in excess of several million dollars. The damages incurred by Clinton, Ft. Oglethorpe and West Knoxville include not only the difference between the contract purchase prices for the shopping centers and the best price now obtainable, but also include claims against PISCO for non-payment of master lease rent, conversion of tenant rents and tenant security

deposits, failure to pay for property repairs and debt service and similar claims arising out of previous sale-leaseback transactions between plaintiffs and PISCO.

17. Pursuant to an agreement between Brunswick and PISCO, dated November 1, 1985, PISCO undertook to transfer certain property to Brunswick. Contrary to the express terms of the sale, PISCO caused the property to be transferred to Brunswick encumbered by a mortgage in favor of First National Bank of Louisville, Kentucky, in the approximate amount of $1,590,154, without Brunswick's knowledge or authorization. Brunswick's claims against PISCO also include damages for non-payment of master lease rent, conversion of tenant rents and tenant security deposits, failure to pay for property repairs and debt service and similar claims arising out of a previous sale-leaseback transaction between Brunswick and PISCO.

18. The nature and extent of plaintiff's claims against PISCO are set forth with greater particularity in their proofs of claim, each dated August 22, 1989 (the "Proofs of Claim"), signed on behalf of plaintiffs by Mark A. Berlin ("Berlin"), who is President of both Robriste and Pudding. Copies of the Proofs of Claim (without exhibits) are annexed hereto as Exhibits A, B, C and D and made a part hereof, as follows:

	Claimant	Amount
Exhibit A	Brunswick	$2,364,336
Exhibit B	Clinton	1,567,650
Exhibit C	Ft. Oglethorpe	730,322
Exhibit D	West Knoxville	2,280,831
	Total	$6,943,139

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19. By reason of the professional negligence of one or more of Richards, M&K and MT&L, and in violation of an express contract between M&K and plaintiffs, the Proofs of Claim were not filed timely and there has been a judicial determination in the Bankruptcy Proceeding rejecting plaintiffs' application to extend the time to file the Proofs of Claim or to allow the filing of the Proofs of Claim *nunc pro tunc*.

20. By order dated April 13, 1989 (the "Bar Order"), the bankruptcy court (a) fixed May 5, 1989 as the date for the first meeting of creditors under Section 341(a) of the Bankruptcy Code, and (b) fixed August 3, 1989 as the last day to file proofs of claim in the Bankruptcy Proceeding (the "Bar Date").

21. The Bar Order provides in part:

> You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount See 11 USC Sec 1111 and Bankruptcy rule 3003.
>
> Bar date is August 3, 1989.

The debtor's amended schedules, filed May 25, 1989, list the claims of Brunswick, Clinton and West Knoxville as contingent and unliquidated Ft. Oglethorpe was omitted from the schedules.

22. Shortly after April 13, 1989, and before plaintiffs had retained counsel to represent them in the Bankruptcy Proceeding, Brunswick, Clinton and West Knoxville, having been listed among PISCO's 20 largest creditors, received copies of the Bar Order. Ft. Oglethorpe was not listed in the debtor's schedules and did not receive a copy of the Bar Order.

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23. Berlin is engaged in the business of real estate and financial management. He is a certified public accountant and is an attorney licensed to practice law in Florida and New York. Berlin specialized in the field of taxation, and has no familiarity with bankruptcy law.

24. The first Section 341(a) meeting was held in Knoxville, Tennessee on May 19, 1989 (having been adjourned from May 5, 1989, the date fixed in the Bar Order). Berlin attended the meeting on behalf of the plaintiffs, and together with a representative of the United States Trustee conducted a preliminary examination of the debtor. The examination of the debtor was not completed at the first Section 341(a) meeting, in part because of the incompleteness of the debtor schedules and statement of affairs, and the meeting was adjourned to June 16, 1989.

25. On June 13, 1989, Brunswick, Clinton and West Knoxville, by Berlin, as President of Robriste, their general partner, entered into a written retainer agreement with M&K (the "Retainer Agreement"), a copy of which is annexed hereto as Exhibit E and made a part hereof. The Retainer Agreement provides, in part:

> We agree to act on your behalf and to provide such general legal services as we mutually agree upon in connection with our representation of the various limited partnerships in the bankruptcy proceeding of Pioneer Investment Services Company now pending in Knoxville, Tennessee.
>
> .....
>
> Thank you again for your confidence.

26. The Retainer Agreement was signed on behalf of M&K by Richards. Although Ft. Ogelthorpe was not specifically included in the Retainer Agreement, Richards acknowledged that M&K would represent Ft. Oglethorpe's interests in the Bankruptcy Proceeding as well.

27. On information and belief, Richards joined M&K as a partner in January 1988, when that firm was formed, and remained a partner of M&K until on or about July 31, 1989, when he and three other M&K bankruptcy partners in New York, together with virtually all of the associates in the bankruptcy department, resigned from M&K Richards became a partner or shareholder of MT&L on or about August 1, 1989.

28. Richards is and holds himself out to be an expert bankruptcy lawyer. On information and belief, he has practiced in this field exclusively for seven years, and has participated in some of the larger bankruptcy cases filed across the country, including Baldwin-United, LTV, Braniff Airlines, Tacoma Boat Building, Family Health Plans a/k/a Maxicare Health Plans, DRW Realty, Wilson Foods and Spector Red Ball.

29. M&K's representation of Brunswick, Clinton and West Knoxville commenced on or about June 7, 1989, when Richards met with Berlin and others at Berlin's offices for more than two hours. Although the Retainer Agreement was not executed in final form until June 13, 1989, Richards had sent Berlin a previous draft of this document for signature on June 7. This draft was unacceptable to Berlin as it provided only for representation of Clinton, and not Brunswick and West Knoxville. Accordingly, Richards redrafted the document which was signed on June 13.

30. During their meeting on June 7, 1989, Berlin turned over

to Richards substantially all of the documents received by Brunswick, Clinton and West Knoxville in the Bankruptcy Proceeding, including the Bar Order. Berlin retained a copy of the documents provided to Richards.

31. On information and belief, Richards devoted 30 minutes on June 12, 1989 to a review of the documents previously provided him by Berlin, consisting of less than 50 pages of documents, including the Bar Order.

32. On June 14, 1989, M&K, by Richards, caused a Notice of Appearance and Request to Receive Documents to be filed in the Bankruptcy Proceeding.

33. On June 16, 1989, Richards and Berlin traveled to Knoxville, Tennessee together and attended the second adjourned Section 341(a) meeting. During the return trip to New York City, Richards assured Berlin on at least two occasions that proofs of claim on behalf of plaintiffs would be prepared and filed "within a week."

34. The docket sheet in the Bankruptcy Proceeding reflects over 50 entries in the case between June 16 and August 3, 1989, including M&K's Notice of Appearance and Request to Receive Documents On information and belief, M&K received copies of the motions, orders and other documents filed in the Bankruptcy proceeding during this period.

35. On information and belief, between June 19 and August 3, 1989, Richards expended approximately eight hours on this matter including initiating or participating in not less than 20 telephone calls with, among others, counsel to the Creditors' Committee, counsel for the debtor and Berlin. Between June 19 and

August 3, 1989, in virtually every telephone call and personal conference with Richards, Berlin asked Richards when the claims would be filed.

36. No proofs of claim on behalf of plaintiffs were filed on or before August 3, 1989.

37. On information and belief, when Richards resigned from M&K on July 31, 1989, the case files for plaintiffs' and other matters were not released to him or to MT&L by M&K.

38. On or about August 9, 1989, MT&L, by Richards, caused an Amended Notice of Appearance and Request to Receive Notices to be filed in the Bankruptcy Proceeding.

39. On August 10, 1989, Richards, who had as yet not received plaintiffs' case file from M&K, came to Berlin's offices and reviewed the document in the case, copies of which had been retained previously by Berlin. The Bar Order was included in the file reviewed by Richards.

40. Between August 10 and August 14, 1989, plaintiffs and Richards became aware that the Bar Date had expired on August 3, 1989. On information and belief, Richards advised Berlin on August 14, 1989 that in view of the fact that the Bar Date had expired and that no proofs of claim had been filed timely on behalf of plaintiffs, Richards would forthwith file an application for an extension of the time to file proofs of claim.

41. On August 15, 1989, Richards informed Berlin that M&K was still in possession of plaintiffs' case file, and Berlin sent a hand-delivered letter to M&K demanding the immediate release of plaintiffs' case file, then still being held at M&K.

42. On August 22, 1989, MT&L, by Richards, caused a motion to extend the time to file proofs of claim or to allow the filing of proofs of claim *nunc pro tunc* to be filed in the Bankruptcy Proceeding on behalf of Brunswick, Clinton, Ft. Oglethorpe and West Knoxville. A copy of the motion, to which are annexed affidavits of Berlin and Richards, each sworn to August 22, 1989, and of the Proofs of Claim, is annexed hereto as Exhibit F.

43. On August 24, 1989, plaintiffs' case file was delivered to Berlin's offices by M&K Berlin was out of the office until September 5. On September 5, 1989, Berlin, in the presence of an attorney, Mark Gasarch, Esq ("Gasarch"), opened the file received from M&K. At that time, Gasarch's secretary photocopied the entire contents of a subfolder marked "Legal," which was found in the file. A copy of the Bar Order was contained in the "Legal" file. Later that day, Gasarch sent the entire file received from M&K to Richards at MT&L.

44. A hearing was held on plaintiffs' motion before United States Bankruptcy Judge Richard Stair, Jr. on September 14, 1989. Both Berlin and Richards testified in support of the motion, and the court reserved decision.

45. On October 10, 1989, the bankruptcy judge filed a 22-page Memorandum denying the motion, together with an Order implementing the decision Copies of the Memorandum and Order are annexed hereto collectively as Exhibit G. On information and belief, MT&L has filed a timely notice of appeal from the Order.

46. On information and belief, PISCO has informed the Creditor' Committee in the Bankruptcy Proceeding, and counsel for the Creditors' Committee, that a proposed plan of reorganization will be filed by PISCO which will provide for

payment in full of all claims of both secured and unsecured creditors.

First Cause of Action
(All Defendants)

47. Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 46.

48. By undertaking to represent plaintiffs and to protect their interests in the Bankruptcy Proceeding, defendants undertook to perform such services with reasonable skill, care and diligence.

49. By failing to prepare and timely file the Proofs of Claim in the Bankruptcy Proceeding within the prescribed time limitation, by failing to inform plaintiffs of their failure to do so, and by failing to procure for plaintiffs an extension of time to do so, defendants were negligent in the performance of the services for which they were employed by plaintiffs, resulting in damage to plaintiffs.

50. But for the negligence of the defendants, plaintiffs' claims could or would have been collected.

51. By reason of the foregoing, plaintiffs have been damaged in an amount of not less than $6,943,139, or such other amounts as may be proved at trial, for which defendants are jointly and severally liable to plaintiffs.

Second Cause of Action
(Myerson & Kuhn Defendants)

52. Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 46.

53. M&K contracted with the plaintiffs in the Retainer Agreement to act on plaintiffs' behalf and to represent plaintiffs in the Bankruptcy Proceeding. Implicit in M&K's undertaking was the obligation of M&K to assert Plaintiffs' claims in a timely manner in the Bankruptcy Proceeding.

54. By failing to prepare and timely file the Proofs of Claim in the Bankruptcy Proceeding within the prescribed time limitation, by failing to inform plaintiffs of its failure to do so, and by failing to procure for plaintiffs an extension of time to do so, M&K breached this agreement and contract with plaintiffs.

55. But for the breach of contract by M&K as aforesaid, plaintiffs' claims could or would have been collected.

56. By reason of the foregoing breach of contract, plaintiff has been damaged in an amount of not less than $6,943,139, or such other amount as may be proved at trial, together with prejudgment interest to the extent permitted by law.

WHEREFORE, Plaintiffs Brunswick Associates Limited Partnership, Clinton Associates Limited Partnership, Ft. Oglethorpe Associates Limited Partnership and West Knoxville Associates Limited Partnership demand judgment against defendants:

(a) on the first cause of action against all defendants, jointly and severally in an amount of not less than $6,943,139, or such other amounts as may be proved at trial;

(b) On the second cause of action against the Myerson & Kuhn defendants in the amount of not less than $6,943,139, plus prejudgment interest to the extent permitted by law;

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(c) Awarding plaintiffs the costs and disbursements of this action, including reasonable attorney's fees, and

(d) Granting plaintiffs such other further relief as this Court deems just, proper and equitable in the circumstances.

Dated: New York, New York
October 26, 1989

LANSING R. PALMER, ESQ.
By s/ Lansing R. Palmer
Attorney for Plaintiffs
599 Lexington Avenue
28th Floor
New York, New York 10022
(212) 826-1800

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STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

MARK A. BERLIN, being duly sworn, says that he is President of Robriste Enterprises Inc., the General Partner of Brunswick Associates Limited Partnership, Clinton Associates Limited Partnership and West Knoxville Associates Limited Partnership, plaintiffs named in the foregoing Complaint; that he has read the foregoing Complaint and knows the contents thereof; that the same is true to his knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

s/ Mark A. Berlin
Mark A. Berlin

Sworn to before me
October 26, 1989
s/ Lily Chin
Notary Public
Lily Chin
State of New York
No. 03-4859344
Qualified in Bronx County
Commission Expires April 21, 1990

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STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

MARK A. BERLIN, being duly sworn, says that he is President of Pudding Enterprises Inc , the General Partner of Ft. Oglethorpe Associates Limited Partnership, a plaintiff named in the foregoing Complaint that he has read the foregoing Complaint and knows the contents thereof; that the same is true to his knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

s/ Mark A. Berlin
Mark A. Berlin

Sworn to before me
October 26, 1989
s/ Lily Chin
Notary Public
Lily Chin
State of New York
No. 03-4859344
Qualified in Bronx County
Commission Expires April 21, 1990

APPENDIX L — MEMORANDUM OPINION OF UNITED STATES DISTRICT COURT AFFIRMING IN PART, REVERSING IN PART AND REMANDING DECISION OF UNITED STATES BANKRUPTCY COURT FILED FEBRUARY 20, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

FILED
FEB 20, 1990

No. CIV
3-89-0927

In re PIONEER INVESTMENT SERVICES COMPANY,

Debtor.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP. et al.,

Appellants,

v.

PIONEER INVESTMENT SERVICES COMPANY,

Appellee.

MEMORANDUM OPINION

The issue on appeal in this case is whether the Bankruptcy Court erred in holding that the four appellants were barred from filing Proofs of claim in the debtor's reorganization case in

bankruptcy because they missed the filing deadline, the "bar date". The four appellants are limited partnerships, Brunswick Associates Limited Partnership ("Brunswick"), Clinton Associates Limited Partnership ("Clinton"), Ft. Oglethorpe Associates Limited Partnership ("Ft. Oglethorpe"), and West Knoxville Associates Limited Partnership ("West Knoxville"). The appellee is the debtor, Pioneer Investment Services Company ("PISCO"). United States Bankruptcy Judge Richard Stair, Jr. denied the relief sought by the appellants in a thoughtful memorandum opinion filed October 10, 1989, which appears as item No. 9 in the record on appeal. Judge Stair's findings of fact are not clearly erroneous, and therefore may not be set aside. Bankruptcy Rule 8013. Counsel for the parties agreed at oral argument before this Court that there are no factual issues presented in this appeal.

The facts reveal the following chronology. On April 12, 1989, the debtor filed its petition for relief, On April 13. the Bankruptcy Court Clerk issued a notice of the 11 U.S.C. ss 341 meeting of creditors. This notice included the following statement:

> You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 USC Sec. 1111 & Bankruptcy Rule 3003. Bar date is August 3, 1989.

Three of the appellants received this notice, Ft. Oglethorpe was not sent one. The three notices were all received by Mark A. Berlin.

Mark A. Berlin was at all pertinent times the president of Pudding Enterprises, Inc, the corporate general partner of Ft. Oglethorpe, and the President of Robriste Enterprises, Inc., the corporate general Partner of the other three appellants. He

attended the creditors' meeting on May 19, 1989. When the Assistant United States Trustee asked for appearances to be stated on the record, Mr. Berlin stated his name, and listed all four of the appellants. During the meeting, Mr, Berlin referred to himself as the general partner of several of these partnerships, and stated that, while he is an attorney at law, he was not the attorney for the appellants. Mr. Berlin questioned the debtor's representative, Milton A. Turner, about PISCO's dealings with all four of the appellants, and asked specifically why PISCO had not scheduled Ft. Oglethorpe as a creditor.

The creditors' meeting was adjourned until June 19, 1989. Mr. Berlin attended this meeting, too, with Marc E. Richards, Esq. of the New York, New York law firm of Myerson & Kuhn. Mr. Richards announced that he was appearing for the appellant Clinton. On June 19, 1989, Mr. Richards filed a written notice of appearance on behalf of Clinton. However, as Judge Stair found, affidavits signed by Mr. Berlin and Mr. Richards show that Mr. Richards represented all four of the appellants in the Bankruptcy Court. Counsel for the appellants conceded at oral argument before this Court that Mr. Richards represented all of the appellants in the Bankruptcy Court.

Concerning Mr. Richards' representation of the four appellants. Judge Stair quoted from an affidavit made by Mr. Berlin:

> [T]he Partnerships retained Mr, Richards as bankruptcy counsel in mid-June, 1989. At that time, I had [the] Partnerships' bankruptcy file reproduced and given to Mr. Richards, I also inquired as to the time for filing the Partnerships' Proofs of claim, Richards advised me that as there

was no bar date, that the filing of the Partnerships' proofs of claim was not a matter of urgency.

Some time after the appellants retained him, Mr. Richards left Myerson & Kuhn to practice with another law firm, and for a time was unable to gain possession of his file concerning this representation. However, there is no evidence that he asked Mr, Berlin for the duplicate file during this period.

The appellants did not file Proofs of claim by the August 3, 1989 bar date, even though the debtor's amended schedules do not list Ft. Oglethorpe as a creditor, and list the claims of the other three appellants as contingent, unliquidated, and disputed. On August 23, 1989, all four appellants, by Mr. Richards as their attorney, moved for an extension of time within which to file proofs of claim, or, in the alternative, to allow the filing of their proofs of claim nunc pro tunc, Mr. Berlin and Mr. Richards submitted affidavits in support of this motion, and the appellants' proofs of claim were proffered with the motion. Judge Stair's denial of this motion led to this appeal.

The appellants make four arguments why Judge Stair's decision should be overturned. First, they argue that Judge Stair erred as a matter of law when he held that a motion for an extension of time within which to file proofs of claim filed after a bar date set by the Bankruptcy Court is governed by both the "for cause shown" language of Bankruptcy Rule 3003(c) (3), and by Bankruptcy Rule 9006(b)(1), which provides in pertinent part, "[W]hen an act is required or allowed to be done at or within a specified period . . . by order of court, the court for cause shown may at any time in its discretion . . . on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect."

Second, the appellants argue that if Rule 9008(b)(1)'s excusable neglect standard does apply, the Bankruptcy Court erred in construing the phrase too strictly, to require a showing that the appellants' failure to file their proofs of claim on or before the bar date was due to circumstances beyond the reasonable control of the appellants or their attorney. The appellants say that this "beyond reasonable control" construction reads the word "neglect" out of the rule, since one cannot truly be said to have neglected to do what was beyond one's ability to do.

Third, the appellants argue that, no matter what the proper legal standard for considering a late motion to extend the time for filing Proofs of claim, Judge Stair abused his discretion in not allowing the extension of time or the filing nunc pro tunc under the circumstances. Fourth, Ft. Oglethorpe argues that barring its claim against PISCO in spite of the fact that no notice of the 11 U.S.C. ss 341 meeting of creditors was mailed to it denies it due process.

The appellants' first, second, and fourth arguments ask this Court to determine whether the Bankruptcy Court erred in its conclusions of law, which requires *de novo* consideration of these conclusions. *Matter of Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1252 (5th Cir. 1986) (citation omitted). The appellants' third argument asks this Court, after determining the rules of law properly to be applied, to determine whether Judge Stair abused his discretion in applying these rules to the facts.

This Court is convinced that Judge Stair did not err in concluding that Bankruptcy Rules 3003(c)(3) and 9006(b) must be read together in considering a motion to extend the time for filing Proofs of claim filed after the bar date set in a chapter 11 case. *In re Vertientes*, 845 F.2d 57, 59, 60 (3rd Cir. 1988),

and *In re South Atlantic Financial Corp.*, 767 F.2d 814, 817 (11th Cir. 1985), *cert. denied, sub nom. Biscayne 21 Condominium, Inc. v. South Atlantic Financial Corp.*, 475 U.S. 1015 (1986). *See also Matter of Robintech, Inc.* 863 F.2d 393, 297 n.2 (5th Cir.), *cert. denied, sub nom. Bullock v. Oppenheim, Appel, Dixon & Co.*, ___ U.S. ___ [110 S. Ct. 55] (1989) (citation omitted) ("The [creditor] also could have, but failed to, ask for an extension after the bar date passed, based upon excusable neglect.") Rule 9006(b)(1) is the more specific rule, since it applies expressly to any motion for an extension of time filed "after the expiration of the specified period".

The Court of Appeals for this Circuit has not had occasion to address this issue. However, the approach taken by Judge Stair is consistent with the practice under the former rules. *See In re Yoder Company*, 758 F.2d 1114, 1117-18 (6th Cir. 1985) (whether a creditor's claim was barred for late filing of his proof of claim considered under the Bankruptcy Rule 906(b) standard of excusable neglect). Many courts, including bankruptcy courts, district courts, and a bankruptcy appellate panel, have come to the same conclusion as did Judge Stair. *See*, for example, *In re Dix*, 95 Bankr. 134 (B.A.P. 9th Cir, 1988); *Mackie v. Production Oil Co.*, 100 Bankr. 826 (N.D. Tex. 1988); *In re STN Enterprises, Inc.*, 99 Bankr. 218 (D. Vt. 1988); *In re Wolray Hotels, Inc.* 99 Bankr. 480 (Bankr. M.D. Fla. 1989); and *In re Jackson*, 98 Bankr. 738 (Bankr. D. Md. 1986).

The question of the definition of "excusable neglect" for the purposes of the rule is precisely the one left unanswered by the Court of Appeals for this Circuit in *In re Yoder Company*, 758 F.2d 1114, 1117-18 and n.4 (6th Cir. 1985). Judge Stair, relying on *In re South Atlantic Financial Corp.*, 767 F.2d 814 (11th Cir. 1985), *cert. denied, sub nom. Biscayne Condominium Association,*

Inc. v. South Atlantic Financial Corp., 475 U.S. 1015 (1986), and other authorities, applied the definition of excusable neglect which requires a showing that the failure to perform timely a duty was due to circumstances beyond the reasonable control of the person charged with the duty. Judge Stair also relied upon *Sherrod v. Piedmont Aviation, Inc.*, 516 F. Supp. 39, 41 n.1 (E.D. Tenn. 1978) (citation omitted), in which District Judge Neese, construing the similar provision in Fed. R. Civ. P. 6(b)(2), held that excusable neglect is not shown when the failure to perform the duty was due to simple inadvertence on the part of counsel, or to counsel's mistake regarding the applicable procedural rules, or to counsel's unfamiliarity with the rules.

While there is respectable authority for the narrow reading of "excusable neglect", this Court believes that the Court of Appeals for this Circuit will require a more liberal approach to construing and applying the rule. In *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 397-400 (6th Cir.), *cert. denied, sub nom. Garratt v. INVST Financial Group, Inc.*, 484 U.S. 927 (1987), the Court indicated that consideration of a Fed. R. Civ. P. 60(b) motion to set aside a default judgment requires consideration of whether the plaintiff will be prejudiced by the granting of the motion, of whether the moving defendant has stated a meritorious defense, and of whether culpable conduct on the part of the defendant led to the default sought to be set aside. In *In re Winner Corporation*, 632 F.2d 658, 660-61 (6th Cir. 1980), the Court reversed a district court's dismissal of a bankruptcy appeal, holding that the late filing of the designation of the record on appeal under former Bankruptcy Rule 806 would not justify dismissal of the appeal in the absence of a finding of negligence or indifference on the part of the appellant, and at least implying that a finding of bad faith is necessary to support such a dismissal.

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This Court understands the importance of claims-filing deadlines in chapter 11 cases, and perceives that this importance might justify treating motions for extensions like the one presented to the Bankruptcy Court by the appellants less generously than a Fed. R. Civ. P. 60(b) motion or a motion to extend a deadline set by Bankruptcy Rule 8006.

> The purpose of the bankruptcy laws is quickly and effectively to settle bankrupt estates . . . [B]ecause [bankruptcy] procedures are thought to be necessary to protect the bankrupt and the creditors, exceptions cannot be made every time a creditor claims hardship . . . . Frequent players in the bankruptcy arena . . . know this and are aware that deadlines are important and should not be heard to complain of unfairness except under the most egregious circumstances.

Matter of Robintech, Inc., 863 F.2d 393, 397-98 (5th Cir.), *cert. denied, sub nom. Bullock v. Oppenheim, Appel, Dixon & Co.*, ___ U.S. ___ [110 S. Ct. 55] (1989) (citations omitted). Nevertheless, this Court believes that the Court of Appeals, if and when confronted with this issue, will require the lower courts to read the "excusable neglect" rule more liberally than the "beyond-reasonable-control" reading.

This Court believes that the five factors listed in *In re Dix*, 95 Bankr. 134, ___ (B.A.P. 9th Cir. 1988) (citation omitted), are applied appropriately in cases like this to determine whether a creditor has satisfied the Bankruptcy Rule 9006(b) requirement of a showing of excusable neglect:

> (1) whether granting the delay will prejudice the debtor;

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> (2) the length of the delay and its impact on efficient court administration;
>
> (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform;
>
> (4) whether the creditor acted in good faith; and
>
> (5) whether clients should be penalized for their counsel's mistake or neglect.

In addition, following *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 3970400 (6th Cir.), *cert. denied, sub nom. Garratt v. INVST Financial Group, Inc.*, 484 U.S. 927 (1987), and *In re Winner Corporation*, 632 F.2d 658, 660-61 (6th Cir. 1980), the Bankruptcy Court in applying Bankruptcy Rule 9006(b) should find whether a failure to file a proof of claim on or before a bar date resulted from negligence, indifference or culpable conduct on the part of a moving creditor or its counsel.

This Court will therefore remand this case to the Bankruptcy Court for reconsideration of the appellants' motion against these factors. It will be unnecessary for the Bankruptcy Court to make findings of fact concerning the length of the appellants' delay, whether the delay was beyond the reasonable control of the person whose duty it was to perform, whether the appellants should be penalized for their counsel's mistake or neglect, and whether the failure to file proofs of claim on or before the bar date resulted from negligence, since the Bankruptcy Court's findings of fact in Judge Stair's memorandum opinion address these issues either explicitly or implicitly. Furthermore, it will be for the Bankruptcy

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Court to determine how to weigh the relative importance of the various factors in this particular case and in other cases, since the determination of the presence or absence of excusable neglect under Bankruptcy Rule 9006(b) must be made case by case.

This disposition of this appeal makes it unnecessary or at least premature to decide whether Judge Stair abused his discretion in denying the appellants' motion. Since it is possible that reconsideration of the motion will lead to the granting of some or all of the relief sought, this Court will not address the due process issue raised by Ft. Oglethorpe, in light of the familiar rule concerning the avoidance of constitutional issues not necessary to a judicial decision. Once the Bankruptcy Court has reconsidered the appellants' motion under the criteria stated in this opinion, the parties will have an opportunity to appeal again to this Court. However, the Court cautions the parties and their counsel that, the legal issues having been decided, any decision by the Bankruptcy Court to grant or to deny the appellants' motion will stand unless an abuse of discretion is shown. *In re Vertientes, Ltd.*, 845 F.2d 57, 59 (3rd Cir. 1988). "Whether or not to extend a bar date is a matter within the sound discretion of the bankruptcy court and such a decision will not be set aside absent an abuse of discretion." *In re Dix*, 95 Bankr. 134, ____ (B.A.P. 9th Cir. 1988) (citations omitted).

ENTER:

Leon Jordan
United States District Judge

APPENDIX M — ORDER OF UNITED STATES DISTRICT COURT PURSUANT TO MEMORANDUM OPINION OF FEBRUARY 20, 1990 FILED FEBRUARY 20, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

FILED
FEB 20, 1990

No. CIV
3-85-0927

In re PIONEER INVESTMENT SERVICES COMPANY,

Debtor.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, et al.,

Appellants,

v.

PIONEER INVESTMENT SERVICES COMPANY,

Appellee.

ORDER

For the reasons stated in the Court's Memorandum Opinion filed simultaneously with this Order, the decision of the United States Bankruptcy Court for the Eastern District of Tennessee denying the appellants' motion for an extension of time within which to file their proofs of claim in this case in bankruptcy is

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AFFIRMED IN PART and DENIED IN PART. These proceedings are REMANDED to the Bankruptcy Court for reconsideration of the appellants' motion in accordance with the instructions stated in this Court's Memorandum Opinion.

ENTER:

Leon Jordan
United States District Judge

APPENDIX N — MEMORANDUM OPINION OF UNITED STATES BANKRUPTCY COURT DENYING MOTION OF RESPONDENTS TO EXTEND THE TIME TO FILE PROOFS OF CLAIM FILED JUNE 20, 1990 NUNC PRO TUNC TO JUNE 8, 1990

MEMORANDUM OPINION

June 8, 1990

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

IN RE:

PIONEER INVESTMENT SERVICES CO., A/K/A PREMIERE RESTAURANT INVESTMENT COMPANY,

Debtor.

Case No. 3-89-01058

BEFORE THE HONORABLE RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

FOR THE DEBTOR:

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FOR FIRST NATIONAL BANK OF LOUISVILLE:

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FOR PAUL D. POWSNER:

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FOR BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP:

JOHN A LUCAS, ESQ.
HOWARD E. FRASIER, JR., ESQ.
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FOR BANQUE WORMS:

M. EDWARD OWENS, JR., ESQ.
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FOR THE UNITED STATES TRUSTEE:

PATRICIA C. FOSTER, ESQ.
Suite 610, Plaza Tower
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FOR THE UNSECURED CREDITORS' COMMITTEE:

JOHN A. WALKER, JR., ESQ.
715 First American Center
Knoxville, Tennessee 37902

THE COURT: On October 10, 1989, I entered an order supported by a Memorandum Opinion denying a motion filed August 23, 1989 by Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership, and Fort Oglethorpe Associates Limited Partnership. The partnerships' motion seeks an order extending the August 3, 1989 bar date for filing proofs of claim to August 23, 1989, the date each partnership filed a proof of claim or, alternatively, requests an order authorizing the filing of each claim nunc pro tunc to the claims' bar date.

In my October 10, 1989 memorandum opinion, I relied on *In re South Atlantic Financial Corporation*, 767 F.2d 814, a 1985 case out of the Eleventh Circuit, and other authorities in applying a definition of excusable neglect under Bankruptcy Rule 9006 (b) (1) which required a showing that the failure to perform a duty timely, in this instance the filing of the partnerships' proofs of claim, was due to circumstances beyond the reasonable control of the person charged with the duty. In my findings, I relied upon *Sherrod v. Piedmont Aviation, Inc.*, 516 F. Supp. 39 at Page 41, Note 1, a 1978 District Court decision out of this district, in which Judge Neese, in construing Federal Rule of Civil Procedure 6(b), the federal rule upon which Bankruptcy Rule 9006 (b) (1) is patterned, held that excusable neglect is not shown when the failure to act is due to simple inadvertence on the part of counsel, or counsel's mistake regarding the content of the rules, or counsel's lack of familiarity with the rules. The partnership

appealed my disallowing their claim.

The District Court in a memorandum opinion filed February 20, 1990 held that the findings of fact contained in my October 10, 1989 memorandum opinion were not clearly erroneous and would not be set aside. However, the District Court held that I construed the excusable neglect standard of Bankruptcy Rule 9006 (b) (1) too narrowly. Judge Jordan remanded with instructions that I reconsider the excusable neglect associated with the late filing of the partnerships' claims within the context of the liberal excusable neglect standard enunciated by the Ninth Circuit Bankruptcy Appellate Panel in *In re Dix*, 95 B.R. 134, a 1988 case. In *Dix*, the material facts were that a creditor moved to extend time to file a proof of claim two years after expiration of the bar date. The Court found that the debtor had not listed the creditor in the schedules accompanying its chapter 11 petition and that the creditor had not known of his claim at the time of the bar date, but did learn of it about a year before he filed his motion for extension of time.

The Ninth Circuit Bankruptcy Appellate Panel, applying a liberal standard, found that the creditor had established excusable neglect. In addition, the Court listed five factors to be considered in determining whether a creditor has satisfied the excusable neglect standard under Bankruptcy Rule 9006 (b) (1). These factors are: "(1) whether granting the delay will prejudice the debtor; (2) the length of the delay and its impact on efficient court administration; (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform; (4) whether the creditor acted in good faith and (5) whether clients should be penalized for their counsel's mistake or neglect." 95 B.R. at 138, quoting *In re Magouirk*, 693 F2d 948 at 951, a 1982 decision out of the United States Court of Appeals for the Ninth Circuit.

In addition to his instructions to apply the *Dix* excusable neglect standard, Judge Jordan in his February 20, 1990 memorandum opinion stated that "the Bankruptcy Court in applying Bankruptcy Rule 9006 (b) should find whether a failure to file a proof of claim on or before a bar date resulted from negligence, indifference or culpable conduct on the part of a moving creditor or its counsel." That quote is contained at Page 10 of Judge Jordan's February 20, 1990 memorandum opinion. He cites *INVST Financial Group, Incorporated v. Chem-Nuclear Systems, Inc.*, 815 F2d 391 at 397 to 400, a 1987 Sixth Circuit case, and *In re Winner Corporation*, 632 F.2d 658 at 660 and 61, a 1980 Sixth Circuit case in support of those instructions.

In its instructions to this Court, the District Court stated: "It will be unnecessary for the Bankruptcy Court to make findings of fact concerning the length of the appellants' delay, whether the delay was beyond the reasonable control of the person whose duty it was to perform, whether the appellants should be penalized for their counsel's mistake or neglect, and whether the failure to file proofs of claim on or before the bar date resulted from negligence, since the Bankruptcy Court's findings of fact in Judge Stair's memorandum opinion address these issues either explicitly or implicitly." That quote is likewise found at Page 10 of Judge Jordan's memorandum opinion.

In sum, this Court, in compliance with the directives of the District Court, is required to analyze the record before it within the context of the liberal excusable neglect standard set forth in *Dix*. Of the five factors enunciated by the *Dix* Court, findings were made in my October 10, 1990 memorandum opinion with respect to factor No. 2, as concerns the length of delay; factor No. 3, concerning whether the delay was beyond the reasonable control of the person whose duty it was to perform; and factor

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No. 5, relative to whether the partnerships should be penalized for their counsel's mistake or neglect.

Further, in my October 10, 1989 memorandum opinion, I also made specific findings relative to the negligence of the partnerships and their former counsel in failing to file proofs of claims prior to the August 3, 1989 bar date. I will proceed to consider the excusable neglect issue before me as it relates to the late-filed claims of the partnerships in the manner directed by the District Court. As further instructed by the District Court, I will rely on my findings set forth in my October 10, 1989 memorandum opinion, except where additional findings are appropriate or required relative to *Dix* factors 1, 2, in part, and 4. My earlier findings, for the most part, will not be restated. Each of the *Dix* factors will be analyzed separately.

Factor No. 1: Whether granting the delay will prejudice the debtor.

With regard to the issue of prejudice, the debtor contends that if the partnerships are allowed to file their claims, it will be required to object to those claims and to engage in further and expensive litigation in defending against the claims. This argument is unpersuasive. The allowance of the partnerships' claims would impose no duty upon the debtor beyond that which already exists. Bankruptcy Code ss 1107, with certain limitations, confers upon a debtor in possession the functions and duties imposed upon a trustee appointed in a Chapter 11 case under Bankruptcy Code ss 1106. One of these duties is to examine proofs of claims and object to the allowance of any proof of claim that is improper. *See* Bankruptcy Code ss 1106(a) (1).

Further, the Court takes judicial notice of the fact that the

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debtor's second amended plan of reorganization filed March 23, 1990, which is presently under consideration by creditors, proposes to deal with the partnerships' claims, to the extent allowed, as a Class 16 creditor. The debtor's second amended disclosure statement filed March 27, 1990, at Pages 54 through 57 and 71, discusses the debtor's treatment of the partnerships' claims. The debtor will not be prejudiced by granting the filing of the partnerships' motion beyond the August 3, 1989 bar date. Factor No. 1 is resolved in favor of the partnerships.

Factor No. 2: The length of the delay and its impact on efficient court administration.

The bar date for filing claims was August 3, 1989. The partnerships filed their claim on August 23, 1989, 20 days beyond the bar date. Other than the time associated with litigating the partnerships' motion in the instant proceeding, the delay has had no adverse or negative impact on efficient court administration. The debtor has proceeded with the reorganization process to the extent that an order approving the adequacy of its second amended disclosure statement was entered April 4, 1990. The solicitation process has begun and, as I have discussed, the debtor's second amended plan of reorganization is before its creditors and interest holders. This plan takes the partnerships' claims into account to the extent the respective claims may be allowed. Factor No. 2 is resolved in favor of the partnerships.

Factor No. 3: Whether the delay was beyond the reasonable control of the person whose duty it was to perform.

The court need not reiterate its findings made October 10, 1989 wherein it determined that it could not "on the record before it . . . find that the failure of the partnerships to file claims prior

to expiration of the bar date were due to circumstances . . . beyond [their] reasonable control." The Court's October 10, 1989 memorandum opinion clearly delineates its findings supporting this conclusion. The 20-day delay in filing the partnerships' claims was not beyond the reasonable control of the partnerships and/or their former attorney, Marc Richards. Factor No. 3 is resolved against the partnerships.

Factor No. 4: Whether the creditors acted in good faith.

There's nothing in the record to suggest that the partnerships or their former attorney, Marc Richards, acted other than in good faith in the filing of the partnerships' claims. Factor No. 4 is resolved in favor of the partnerships.

Factor No. 5: Whether clients should be penalized for their counsel's mistake or neglect.

The Court made specific findings in its October 10, 1989 memorandum opinion relating to the circumstances surrounding the late filing of the partnerships' claims. The Court observes that the Ninth Circuit Bankruptcy Appellate Panel in *Dix* was also confronted with a motion filed by a creditor after expiration of the claims, bar date requesting an extension of time in which to file a proof of claim. The *Dix* court premised its conclusion that it would be improper to penalize the creditor for its attorney's neglect exclusively on its assumption that the attorney "did not sufficiently advise the creditor of his rights and duties as a creditor of the *Dix* estate." *See* 95 B.R. at 139.

The *Dix* Court made no further findings in support of its resolution of Factor No. 5 in favor of the creditor. In the instant proceeding, his Court cannot ignore the fact that Mark Berlin,

President of Pudding Enterprises, Inc., the general partner of Fort Oglethorpe, and the President of Robriste Enterprises, Inc., the general partner of Clinton, West Knoxville and Brunswick, testified that he read the notice contained in the August 3, 1989 bar date upon receipt.

As I noted in my October 10, 1989 memorandum opinion, Mr. Berlin is not an unsophisticated individual when it comes to financial matters. He is engaged in the business of real estate and financial management, he is an attorney licensed to practice law in the states of Florida and New York, and he is a certified public accountant. Additionally, he is the President of the two general partners who manage Clinton, West Knoxville, Brunswick, and Fort Oglethorpe, creditors who assert claims against the debtor in excess of $6,900,000.

This court cannot disregard the fact that Mr. Berlin and, therefore, the partnerships had actual knowledge of the August 3, 1989 claims' bar date shortly after the debtor filed its Chapter 11 petition. Under the circumstances of the instant proceeding, resolution of Factor No. 5 in the partnerships' favor would equate to a finding that notice of a claim's bar date served on a creditor, regardless of the degree of sophistication of that creditor' is ineffective where the creditor subsequently employs counsel. While it is true that the ultimate responsibility for filing the partnerships' proofs of claims falls on Mr. Richards' shoulders, the Court cannot disregard the fact that the partnerships through Mr. Berlin were aware of the claims' bar date shortly after commencement of the bankruptcy case.

Further, Mr. Berlin has been an active participant in the debtor's Chapter 11 case, having participated in the initial and adjourned meetings of creditors, and he has been a member of

the committee of Unsecured Creditors from its inception. Actual knowledge of the claims' bar date by Mr. Berlin and, therefore, the partnerships, precludes the court from finding that it would be improper to penalize the partnerships for the neglect of their attorney. The partnerships and their attorney all had actual knowledge of the August 3, 1989 claims' bar date. Factor No. 5 is resolved against the partnerships.

Did failure of the partnerships to file a proof of claim on or before the August 3, 1989 bar date result from negligence, indifference, or culpable conduct on the part of the creditor or its counsel? Again, I made specific findings in my October 10, 1989 memorandum opinion relating to the circumstances surrounding the August 23, 1989 filing of the partnerships' proofs of claim. Those findings support the conclusion that Mr. Richards was negligent in not timely filing proofs of claims on behalf of the partnerships. To a degree, they also support the conclusion that Mr. Richards' attitude toward the bar date was one of indifference. They do not support a finding of culpable conduct on the part of the partnerships or their former counsel.

The court concludes that Factors No. 1, 2, and 4 of the *Dix* standard of excusable neglect, when isolated, must be resolved in favor of the partnerships. Factors No. 3 and 5 must be resolve against the partnerships. In weighing the relative importance of each of the various factors, the Court is persuaded that under the facts of the instant proceeding Factors No. 3 and 5 must be accorded more weight than Factors No. 1, 2, and 4. Factors No. 3 and 5 go to the procedural heart of the claims' filing process — notice. For this court to hold that the partnerships' late-filed claims are to be allowed as timely filed, notwithstanding that both the partnerships and their attorney had actual knowledge of the August 3, 1989 claims' bar date and ample time to file proofs

of claim, would render nugatory the fixing of the claims' bar date in this case.

Under the extreme facts of this case, a finding that the partnerships' claims should be allowed as timely filed would establish a precedent difficult to overcome in Chapter 11 and chapter 7 asset cases. The Chapter 11 debtor should be secure in the knowledge that the creditor holding a disputed, contingent, or unliquidated claim, who has received notice of the bar date for filing proofs of claim is required to comply with the procedural claims' filing process mandated by Bankruptcy Rule 3003(c).

Whereas, under the facts of this case the court attaches considerable importance to *Dix* factors 3 and 5, it attaches less importance to Factors No. 1, 2, and 4. The Court routinely fixed the August 3, 1989 claims' bar date at 90 days after the initial meeting of creditors required under Bankruptcy Code ss 341(a). On August 3, 1989, less than 120 days had elapsed since the filing of the debtor's petition. As is true in many large Chapter 11 cases, the reorganization process at this time remained in a relative stage of infancy. It's difficult to envision circumstances where Factors No. 1 and 2, standing by themselves, would have been resolved against any creditor in the instant case holding a disputed, contingent, or unliquidated claim who sought to file a proof of claim within reasonable time after expiration of the bar date. Rarely is a delay of a few days in the filing of a claim after expiration of the bar date in a chapter 11 case, when considered by itself, going to prejudice the debtor or impact on efficient court administration. Rarely is a creditor's good faith, and the *Dix* court does not provide a definition of that term within the context of a late-filed claim, going to be seriously at issue with respect to a claim filed shortly after expiration of the bar date.

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Certainly Factors No. 1, 2, and 4 must be considered within the context of each case. The longer the delay, the more critical these factors may become. Notice, however, goes to the very substance of the claims' filing process. The facts supporting the Ninth Circuit Bankruptcy Appellate Panel's allowance of the late-filed claim in *Dix* are dissimilar with the facts confronting this Court in the instant proceeding. The dissimilarity is focused on the creditors' knowledge of the existence of the claims' bar date. In *Dix*, the creditor was not scheduled by the debtor and was unaware of his claim prior to the expiration of the bar date. In the case before me, the partnerships, excepting Fort Oglethorpe, were scheduled by the debtor and all four partnerships, together with their former attorney, had actual knowledge of the August 3, 1989 bar date. On balance, when considered within the context of the actual notice of the partnerships and their attorney of the claims' bar date, the relative importance of *Dix* Factors No. 3 and 5 clearly outweighs the importance of Factors No. 1, 2, and 4. The notice factor is pervasive in analyzing these five factors and it is very difficult to isolate the factors out and treat them separately, a problem the *Dix* court was not confronted with because there wasn't any notice.

It's my conclusion that the partnerships have not established excusable neglect under the standard this Court was directed to follow under the order of remand filed by the District court on February 20, 1990. My order denying the partnerships' motion entered October 10, 1989 will be reaffirmed.

This Memorandum Opinion supplements the Memorandum Opinion previously filed October 10, 1989. An appropriate order will be entered. In the event of the transcription of this opinion, the court reporter will deliver it to me, I will make such amendments and changes as I deem appropriate. I will put down

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an appropriate order memorializing this opinion.

FILED: June 20, 1990, nunc pro tunc to June 8, 1990

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES
BANKRUPTCY JUDGE

APPENDIX O — ORDER OF UNITED STATES BANKRUPTCY COURT PURSUANT TO MEMORANDUM OPINION OF JUNE 8, 1990 FILED JUNE 8, 1990

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

Case No. 3-89-01058

In re

PIONEER INVESTMENT SERVICES COMPANY a/k/a PREMIERE RESTAURANT INVESTMENT COMPANY

Debtor

ORDER

Upon reconsideration of the motion filed August 23, 1989, by Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership, and Ft. Oglethorpe Associates Limited Partnership in the manner directed by the district court in its Order filed February 20, 1990, remanding these proceedings to the Bankruptcy Court, and for the reasons set forth in this court's Memorandum Opinion filed October 10, 1989, as supplemented by findings announced orally in open Court on June 8, 1990, the court reaffirms its order entered October 10, 1989. It is accordingly ORDERED that the motion of Clinton Associates Limited Partnership, West Knoxville Associates Limited Partnership, Brunswick Associates Limited Partnership, and Ft. Oglethorpe Associates Limited Partnership seeking an order extending the August 3, 1989 claims bar date or, alternatively, requesting an order authorizing the filing of these claims shall be and is DENIED.

Appendix O

ENTER: June 8, 1990

BY THE COURT

RICHARD STARR, JR.
UNITED STATES BANKRUPTCY JUDGE

APPENDIX P - MEMORANDUM OPINION OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE FILED SEPTEMBER 12, 1990

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

FILED
SEP 12, 1990

NO. CIV.-
3-90-0666

In re: PIONEER INVESTMENT SERVICES COMPANY,
Debtor-in-Possession,

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, *et al.*,
Appellants,

vs.

PIONEER INVESTMENT SERVICES COMPANY,
Appellee.

No. CIV
3-90-

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, *et al.*,
Appellants,

vs.

PIONEER INVESTMENT SERVICES COMPANY,
Appellee.

Appendix P

MEMORANDUM OPINION

These are appeals from orders entered by the United States Bankruptcy Court for the Eastern District of Tennessee in the case under chapter 11 of the Bankruptcy Code of Pioneer Investment Services Company ("PISCO"). The appellants are four limited partnerships, Brunswick Associates Limited Partnership ("Brunswick"), Clinton Associates Limited Partnership ("Clinton"), Ft. Oglethorpe Associates Limited Partnership ("Ft. Oglethorpe"), and West Knoxville Associates Limited Partnership ("West Knoxville Associates").

This Court, acting on the appellants' motion, consolidated these appeals, and gave them expedited consideration. [*See* doc. 6 in No. CIV 3-90-0666.] The Court heard oral argument on September 5, 1990.

The earlier-filed appeal, No. CIV 3-90-0666, is from the Bankruptcy Court's June 8, 1990 decision denying the appellants' motion for leave to file their proofs of claim after the bar date. The later-filed appeal is from the Bankruptcy Court's decision, rendered on August 17, 1990, that the appellants may not participate in proceedings in PISCO's case in bankruptcy, because they are not creditors of PISCO. [*See* doc. 4, collective ex. 6 in No. CIV 3-90-0666.]

The record on appeal for the later-filed appeal has not been delivered to the Clerk of this court. Furthermore, at the oral argument on September 5, 1990, counsel for Genefin S.A., another creditor of PISCO, appeared and argued that Genefin S.A. should also be a party to this later-filed appeal, because the Bankruptcy Court's ruling on the appellants' standing to participate in proceedings in this case in bankruptcy was instigated at least in part by the motion for a protective order of Genefin S.A., seeking to

protect itself from discovery requested by the appellants for the purpose of establishing that Genefin S.A. is an insider with respect to the debtor, PISCO. Counsel for Genefin S.A. and counsel for the debtor argued that, with respect to the later-filed appeal, the appellants had failed to name in their notice of appeal the parties to the order appealed from, as is required by Bankruptcy Rule 8001 (a) and Bankruptcy Rules, Official Form No. 35.

The Court allowed the debtor to file a brief concerning this standing issue, and allowed Genefin S.A. until Monday, September 10, 1990 to file a brief on the same issue. In light of the current posture of the later-filed appeal, and the fact that the Court is ready to address the issue raised in the earlier-filed appeal, the Court will set aside its earlier Order consolidating these appeals, and rule in this Memorandum Opinion on the issue presented in No. CIV 1-90-0666.

The background of the earlier-filed appeal is set forth in this court's Memorandum Opinion filed on February 20, 1990 in another case arising out of the same case in bankruptcy, No. CIV 3-89-0927 in this Court. [*See* doc. 2, ex. A in No. CIV 3-90-0666.] After the Bankruptcy Court below first denied the appellants' motion for leave to file their proofs of claim after the bar date, this Court reversed the Bankruptcy Court's decision and remanded this contested matter to the Bankruptcy Court for reconsideration of the appellants' motion in light of the five factors listed in *In re Dix*, 95 Bankr. 134 (B.A.P. 9th Cir., 1988), and also to determine whether the appellants' failure to file their proofs of claim timely resulted from negligence, indifference, or culpable conduct on the part of the appellants or their counsel, applying *INVST Financial Group, Inc. v. Chem-Nuclear Systems Inc.*, 815 F. 2d 391 (6th Cir.), *cert. denied, sub nom. Garratt v. INVST Financial Group Inc.*, 484 U.S. 927 (1987); and *In re Winner Corporation*, 632 F.2d 658 (6th Cir., 1980).

This Court noted in its Memorandum Opinion filed in No. CIV 3-89-0927 that "it [would] be for the Bankruptcy Court to determine how to weigh the relative importance of the various factors in this particular case and in other cases, since the determination of the presence or absence of excusable neglect under Bankruptcy Rule 9006 (b) must be made case by case." This Court also warned the parties that subsequent review of any decision made by the Bankruptcy Court on this issue after considering the listed factors would be according to the abuse-of-discretion standard, citing *In re Dix, supra;* and *In re Vertientes, Ltd.*, 845 F.2nd 57 (3rd Cir. 1988).

In the Memorandum Opinion rendered from the bench on June 8, 1990, United States Bankruptcy Judge Richard Stair, Jr. reconsidered the appellants' motion in light of all of the factors required to be considered, assigned relative weights to those factors, and again denied appellants' motion for leave to file their proofs of claim after the bar date. The appellants have appealed from this decision in a timely manner.

The appellants have framed several issues on appeal, assigning error to the Bankruptcy Court's holding that the appellants should be penalized for the mistake or neglect of their counsel, to the Bankruptcy Court's finding that the appellants' counsel had an indifferent attitude toward the bar date, to the Bankruptcy Court's assignment of relative weights to the factors considered by it upon remand, to the Bankruptcy Court's holding that the appellants had failed to show excusable neglect under Bankruptcy Rule 9006 (b), and to the Bankruptcy Court's denial of the appellants' motion for leave to file their proofs of claim *nunc pro tunc* the bar date. All of these assignments of error really state only one, that the Bankruptcy Court erred in refusing to allow the appellants to file their proofs of claim after the bar date. Judge Stair did not make any erroneous findings of fact, and therefore this Court will not set aside any of his

findings of fact. Bankruptcy Rule 8013. In particular, this court finds Judge Stair's finding that the appellants' counsel had an indifferent attitude towards the bar date well supported by the record, since this attorney, an expert in bankruptcy matters, received copies of the notices addressed to three of the four appellants which stated the bar date in time to file proofs of claim timely, but advised the representative of his clients, the appellants, that there was nothing to worry about with respect to filing proofs of claim in the near future. Furthermore, counsel for the parties conceded at the oral argument in No. CIV 3-89-0927 that there were no factual issues presented in that appeal. Since what the Bankruptcy Court did upon remand was to reconsider the facts found by it earlier in light of the factors required to be considered, only the Bankruptcy Court's application of the law to the facts is presented for review in this appeal.

As this court stated in its Memorandum Opinion filed in No. CIV 3-89-0927, the Court's task in this appeal is to determine whether Judge Stair abused discretion by refusing to allow the appellants to file their proofs of claim after the bar date. The Court finds that he did not.

The appellants argue that the effect of Judge Stair's June 8, 1990 ruling was to ignore the *In re Dix* and *INVST Financial Group* factors, and to apply a stricter, beyond-reasonable-control reading of "excusable neglect" under Bankruptcy Rule 9006(b), but the less strict reading of excusable neglect mandated by this Court's decision in No. CIV 3-89-0927 did not necessarily have to result in a reversal of the Bankruptcy Court's initial decision. Judge Stair's conclusion in this case was one legitimately within the discretion accorded to the Bankruptcy Court, particularly in light of the evidence presented of the legal knowledge and business sophistication of the appellants' representative, Mark A. Berlin, and of the attitude of indifference shown by the appellants' then

counsel, Marc E. Richards.

One remaining issue, which this Court found it unnecessary to address in deciding the appeal in No. CIV 3-89-0927, must be decided in this appeal. It is undisputed that no notice of the 11 U.S.C. ss 341 meeting of creditors stating the bar date addressed to one of the appellants, Ft. Oglethorpe, was ever received by Ft. Oglethorpe. Ft. Oglethorpe argues that to bar it from filing a proof of claim after a deadline of which it never received formal notice deprives it of the due process guaranteed to it by the Fifth Amendment to the United States Constitution. This presents an issue of law to be considered de novo by this Court.

Some undisputed facts must be noted in deciding this constitutional issue. Mr. Berlin received three notices stating the bar date addressed to the other three appellants. Mr. Berlin was at all pertinent times the president of Pudding Enterprises, Inc., the corporate general partner of Ft. Oglethorpe. This Court noted in its Memorandum Opinion filed in No. CIV 3-89-0927 that Mr. Berlin attended the creditors' meeting in PISCO's case in bankruptcy on May 19, 1989, as the representative of all four of the appellants. This Court also noted that counsel for the appellants conceded at the oral argument before this Court in No. CIV 3-89-0927 that Mr. Richards represented all of the appellants in the Bankruptcy Court. Therefore, in spite of the lack of formal notice to Ft. Oglethorpe, this creditor had actual notice through Mr. Berlin of the bar date, appeared in the proceedings in the Bankruptcy Court below, first by its representative and then by counsel, and participated in proceedings in this case.

These undisputed facts distinguish this case from the authorities upon which the appellants rely. In *Tulsa Professional Collection Services, Inc. v Pope*, 485 U.S. 478 (1988), in which the Supreme Court held that actual notice by mail, as opposed to

publication notice, was required before the claim of a creditor of a probate estate could be barred, the creditor did not have actual notice of the administration of the decedent's estate and of the bar date for filing claims against the estate.

City of New York v. New York, N.H. & R. Co., 344 U.S. 293 (1953), was decided not under the Due Process Clause, but under a provision of the Bankruptcy Act which required "reasonable notice" to creditors of a bar date for filing claims. In *City of New York*, there was only publication notice to the creditor, and not actual notice of the bar date. The Supreme Court held that the creditor's knowledge of the debtor's ongoing reorganization proceedings was not sufficient to put the creditor on inquiry to discover the bar date. *Accord, Broomall Industries. Inc. v. Data Design Logic Systems, Inc.*, 786 F.2d 401 (Fed. Cir. 1986).

The decision of the court of appeals for this circuit in *In re Yoder Company*, 758 F.2d 401 (6th Cir. 1985), does not require reversal of Judge Stair's ruling, because the court of appeals in that case found the district court's finding that the creditor received notice of the bar date clearly erroneous.

This Court is persuaded by the reasoning in *In re Terex Corporation*, 45 Bankr. 290 (Bankr. N.D. Ohio 1985). In *Terex Corporation*, the widow of the original owner of a claim against the debtor received notice of the bar date for filing claims. The decedent's estate, of which this widow was the executrix, attempted after the bar date to file a proof of claim reflecting a wrongful death claim. It was undisputed that the estate itself was never given notice of the bar date.

In denying the estate's motion for leave to file its proof of claim late, the Bankruptcy Court for the Northern District of Ohio distinguished *City of New York, supra*, and stated in part,

> [The decedent's widow] is correct that the Estate of John Szakmeister never received notice but this is a technicality without merit. Mrs. Szakmeister is one person. The fact that, in her role as executrix of the Estate of John Szakmeister she did not receive notice, does not change the fact that she did individually receive notice.... Her unexplained failure to [file a wrongful death claim before the bar date] is not excused by the fact that a separate notice was not sent to her as executrix.

The appellants' argument in this appeal is that because the Bankruptcy Court did not send to Mr. Berlin a notice stating the bar date which was in exactly the same words as the other three notices received by Mr. Berlin, except addressed to Ft. Oglethorpe instead of to one of the other three appellants, Ft. Oglethorpe is entitled to disregard the bar date of which its representative, Mr. Berlin, had notice. To read the due process requirement to do nothing more than to require one more piece of paper repeating what is contained in three other pieces of paper would elevate form over substance. The Court is not convinced that due process requires this, and so will affirm Judge Stair's denial of the motion for leave to file proofs of claim after the bar date with respect to all four appellants.

ENTER:

Leon Jordan

United States District Judge

APPENDIX Q — ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE FILED SEPTEMBER 12, 1990

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

FILED
SEP 12, 1990

No. CIV-
3-90-0666

In re: PIONEER INVESTMENT SERVICES COMPANY,
Debtor-in-Possession.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, et al.,
Appellants,

v.

PIONEER INVESTMENT SERVICES COMPANY,
Appellee.

NO. CIV-3-
90-_____

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, et al.,
Appellants,

v.

PIONEER INVESTMENT SERVICES COMPANY,
Appellee.

Appendix Q

ORDER

For the reasons stated in the Court's Memorandum Opinion filed simultaneously with this Order, the Court's previous order consolidating these two cases on appeal [doc. 6 in No. CIV 3-90-0666] is SET ASIDE. The Court will decide the issue on appeal in No. CIV 3-90-_____ separately.

In No., CIV 3-90-0666, the Court rules that the Order entered by the United States Bankruptcy Court for the Eastern District of Tennessee on June 8, 1990, denying the appellants' motion for leave to file their proofs of claim after the bar date, is AFFIRMED. Bankruptcy Rule 8013.

ENTER:

Leon Jordan
United States District Judge

APPENDIX R — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED SEPTEMBER 6, 1991

No. 90-6339

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PIONEER INVESTMENT SERVICES COMPANY,
Debtor.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP, and WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP,

Plaintiffs-Appellants,

v.

PIONEER INVESTMENT SERVICES COMPANY,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Tennessee

Decided and Filed September 6, 1991

Before: JONES and NORRIS, Circuit Judges; and JOINER, Senior District Judge.*

NATHANIEL R. JONES, Circuit Judge. Plaintiffs-

---

* The Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.

appellants Brunswick Associates Ltd. ("Brunswick"), Clinton Associates Limited Partnership ("Clinton"), Ft. Oglethorpe Associates Limited Partnership ("Ft. Oglethorpe"), and West Knoxville Associates Limited Partnership ("W. Knoxville"), appeal the district court's order affirming the Bankruptcy Court's decision denying their motion for leave to file their proofs of claim out of time. For the reasons that follow, we reverse.

I.

The facts giving rise to this appeal are uncontested. On April 12, 1989, the debtor-appellee Pioneer Investment Services Company ("Pioneer") filed its voluntary petition for bankruptcy under Chapter 11 of the United States Bankruptcy Code. At the same time, Pioneer filed a list of its twenty largest unsecured creditors. This list included Brunswick, Clinton and W. Knoxville. Pioneer asked for and was granted extensions by the bankruptcy court through May 17, 1989, within which to file its statement of affairs and the relevant schedules.

On April 13, 1989, a Notice for a Meeting of Creditors was mailed by the bankruptcy court clerk's office to the parties in interest setting May 5, 1989 as the date for the creditor's meeting required under Section 341(a) of the Bankruptcy Code. This notice also fixed August 3, 1989, as the bar date for filing proofs of claim by unsecured creditors. This notice specifically provided as regards the bar date:

> You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 U.S.C. § 1111 & Bankruptcy rule 3003.

Bar date is August 3, 1989.

J. App. at 175 (quoting notice). The bankruptcy court found that Mark A. Berlin, president of Robriste Enterprises, Inc., general partner of Clinton, W. Knoxville, and Brunswick, and president of Pudding Enterprises, Inc., general partner of Ft. Oglethorpe, received and read the April 13, 1989 notice. The court also found that Berlin is an experienced businessman engaged in real estate and financial management, an attorney licensed to practice in Florida and New York and a certified public accountant.

The bankruptcy court found that Berlin attended and participated in the May 5, 1989 meeting of creditors. The records to the creditor's meeting held on May 19 also indicate that Berlin entered an appearance on behalf of the partnerships.

Prior to the May 19 meeting, Pioneer filed its statement of financial affairs and the relevant schedules. The plaintiffs are not listed on the schedules as originally filed. However, on May 25, Pioneer amended its schedules to include Clinton, W. Knoxville and Brunswick as creditors holding contingent unliquidated, and disputed claims. Ft. Oglethorpe is not listed on the schedules as a creditor.

On June 5, the United States Trustee filed his "Appointment of Committee of Unsecured Creditors" designating Clinton as a member of the creditors' committee. Berlin, representing Clinton, was a member of this committee from its inception.

The plaintiffs collectively retained Marc Richards as their legal counsel. The bankruptcy court found that Richards was retained in mid-June and was an experienced bankruptcy attorney. Berlin's affidavit also suggests that Richards was provided with

a complete copy of the bankruptcy file for all the partnerships and that the file contained the above-mentioned notice for filing proofs of claim. The testimony also indicates that Richards advised Berlin that there was no bar date in the file and that therefore, filing proofs of claim was not a matter of urgency.

On August 23, 1989, twenty days after the expiration of the bar date, the plaintiffs filed their proofs of claim. The claims were signed on behalf of Clinton, W. Knoxville, and Brunswick by "Mark A. Berlin, President of Robriste Enterprises, Inc. (General Partner)." The claim filed on behalf of Ft. Oglethorpe is signed "Mark A. Berlin, President Pudding Enterprises, Incorporated (General Partner)." The plaintiffs acknowledge that they filed the proofs of claim after the bar date and that they did not file any petition for an extension of time to file such proofs of claim. However, they claimed below, and claim before this court, that the bar date for filing should have been extended as their failure to timely file was due to "excusable neglect", or, in the alternative, that their claims should be allowed *nunc pro tunc* to the bar date.

The bankruptcy court denied the plaintiffs' motion to file their claims late, finding no "excusable neglect" within the meaning of the bankruptcy rules and no reason to exercise its equity power to allow the filing of the claims *nunc pro tunc*. The plaintiffs then appealed to the district court. While the district court accepted all of the bankruptcy court's factual findings, the court found that the bankruptcy court had applied an overly strict interpretation of "excusable neglect" and the court remanded for reconsideration under a more liberal standard. On remand the bankruptcy court again found that, even under the more liberal interpretation of "excusable neglect" there was no basis for allowing the plaintiffs to file their claims out of time. The plaintiffs

again appealed and the district court affirmed. This timely appeal followed.

II.

We review the factual findings of the bankruptcy court under a clearly erroneous standard. Bankr. R. 8013. Whether the court properly found that a proof of claim was filed late due to "excusable neglect" is reviewed for abuse of discretion. *In re Yoder Co.*, 758 F.2d 1114, 1117 (6th Cir. 1985).

Section 1111(a) of the Bankruptcy Code requires creditors to file a proof of claim in circumstances where a particular claim is "scheduled as disputed, contingent, or unliquidated." 11 U.S.C. § 1111(a). In this case the plaintiffs acknowledge that they were required to file a proof of claim. Bankruptcy Rule 3003(c) requires the court to set a time within which proofs of claim may be filed and authorizes the court to extend such time limit "for cause shown." Bankr. R. 3003(c)(3). It appears to be well-established that Bankruptcy Rule 3003 must be read in conjunction with Rule 9006(b), which guides courts as to how and when extensions of time may be granted. *See, e.g., In re Vertientes, Ltd.*, 845 F.2d 57, 60 (3d Cir. 1988); *In re South Atlantic Fin. Corp.*, 767 F.2d 814, 817 (11th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986); *In re Dix*, 95 B.R. 134, 137 (Bankr. 9th Cir. 1988). Rule 9006(b) provides:

> (b) Enlargement
>
> (1) In General. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Bankr. R. 9006(b)(1). In this case, no request for extension of time was made prior to the expiration of the bar date, therefore, the court only has discretion to extend the time for "excusable neglect." *See, In re Vertientes*, 845 F.2d at 59 (court only has discretion to grant extensions as permitted in the two circumstances outlined in Rule 9006(b)(1)).

This court has never defined "excusable neglect" as it relates to the filing of late proofs of claim. Though the question was raised in *In re Yoder*, the court decided the case on other grounds and declined to adopt either a strict or a liberal interpretation of the term. 758 F.2d at 1118 and n.4. The bankruptcy court in the instant action originally adopted the strict interpretation of "excusable neglect" following the Eleventh Circuit. Under this view, "excusable neglect" could only be found when the failure to timely perform was due to circumstances beyond the reasonable control of the party. *In re South Atlantic Fin. Corp.*, 767 F.2d at 817. Other courts have also indicated a tendency to read the procedural requirements of the Bankruptcy Rules and notices strictly in order to further the purpose of quick and effective settlement of bankrupt estates. *See, e.g., In re Robintech, Inc.*, 863 F.2d 393, 397-98 (5th Cir. 1989), *cert denied sub nom., Bullock v. Oppenheim, Appel, Dixon & Co.*, 110 S. Ct. 55 (1989); *Maressa*

v. A. H. Robins Co., 839 F.2d 220, 221 (4th Cir. 1988); *In re Vertientes*, 845 F.2d at 60-61. Reasoning from these and other similar precedents, the bankruptcy court determined that the proper interpretation of the "excusable neglect" rule was a strict one.

On its initial review, the district court reversed, arguing that Sixth Circuit precedent interpreting rules analogous to Bankruptcy Rule 9006(b) indicated a more liberal approach to the concept of excusable neglect. For example, in *INVST Financial Group Inc. v. Chem Nuclear Systems, Inc.*, 815 F.2d 391, 397-400 (6th Cir.), *cert. denied sub nom., Garrett v. INVST Financial Group Inc.*, 484 U.S. 927 (1987), this court interpreted Fed. R. Civ. P. 60(b), which governs motions to set aside default judgments as a result of "excusable neglect." In that case, the court indicated that trial courts must examine a number of factors including prejudice to the plaintiff, the merits of the defendant's defenses and any culpable conduct on the part of the defendant in determining whether a Rule 60(b) motion satisfies the "good cause" or "excusable neglect" standards. *Id.* In addition, in *In re Winner Corporation*, 632 F.2d 658, 660-61 (6th Cir. 1980), this court reversed a district court's dismissal of a bankruptcy appeal, holding that the late filing of a designation of the record on appeal under former Bankruptcy Rule 806 would not justify dismissal of the appeal in the absence of a finding of negligence or indifference on the part of the appellant.

Reasoning form these precedents, the district court concluded that this court would likely adopt an approach similar to the approach taken by the Ninth Circuit in *In re Dix*, 95 B.R. 134 (Bankr. 9th Cir. 1988) with respect to the proper interpretation of "excusable neglect." In *Dix*, the court articulated five factors to be considered in order to determine whether a creditor has

satisfied Bankruptcy Rule 9006(b)'s requirement of excusable neglect:

> (1) whether granting the delay will prejudice the debtor;
>
> (2) the length of the delay and its impact on efficient court administration;
>
> (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform;
>
> (4) whether the creditor acted in good faith; and
>
> (5) whether clients should be penalized for their counsel's mistake or neglect.

95 B.R. at 138. The district court also suggested that on remand the bankruptcy court should consider whether the filing of the late proofs of claim resulted from negligence, indifference or culpable conduct on the part of the moving creditors or their counsel following the standards laid out by the court in *INVST Financial Group*, 815 F.2d at 398-99.

The parties understandably are split over which approach this court should adopt with respect to the application of Rule 9006(b). We find that the district court correctly interpreted this court's precedent to suggest a more textured approach to the "excusable neglect standard." In this regard, we find the *Dix* factors to be helpful in determining when a party has failed to timely file its proof of claims based upon excusable neglect. However, we believe that the *Dix* factors should be applied as aids for case-by-case adjudication, rather than a necessary or

complete list of the factors to be considered.

That said, we turn to the analysis of the bankruptcy court's decision below. Essentially, the appellants' position is that the bankruptcy court on remand did not properly apply the *Dix* factors as directed by the district court. Specifically, the appellants claim that, in the guise of applying the *Dix* factors, the court simply reasserted the strict requirement that parties may only be excused for failure to timely file if that failure was beyond the reasonable control of the party whose duty it was to file. However, we find the plaintiffs' characterization of the bankruptcy court's opinion to be inaccurate. The bankruptcy court considered each of the *Dix* factors individually on remand, and essentially based its decision on the fact that Berlin, an experienced businessman and lawyer, and Richards, an experienced bankruptcy attorney, had actual notice of the bar date and simply failed to meet it. The court further found that Richards was negligent in failing to file the proofs of claim by the bar date and that his actions indicated an indifference to the bar date and the orders of the court.

While we find that the bankruptcy court did apply the *Dix* factors as directed by the district court on remand, it inappropriately penalized the plaintiffs for the errors of their counsel. As noted by the bankruptcy court, the ultimate responsibility of filing the plaintiffs' proof of claims rested with the plaintiffs' counsel Richards. There was evidence in the record to suggest that Mr. Berlin specifically inquired with Richards about the deadline for filing the proof of claims and that Richards had told him that there was no urgency. There was no finding by the bankruptcy court that the plaintiff partnerships were guilty of negligence, bad faith or culpable conduct. In light of the fact that Richards affirmatively told Berlin that there was no urgency with regard to the filing deadline, we find that the partnerships

in all likelihood relied on the expertise of their experienced bankruptcy counsel and paid no further heed to the matter.

We also find it significant that the notice containing the bar date was incorporated in a document entitled "Notice for Meeting of Creditors." Such a designation would not have put those without extensive experience in bankruptcy on notice that the date appended to the end of this notice was intended to be the final date for filing proof of claims. Official Bankruptcy Form 16 provides a model for notifying creditors of a proof of claims deadline in a Chapter 11 bankruptcy.

> The debtor [or trustee] has filed or will file a list of creditors and equity security holders pursuant to Rule 1007. Any creditor holding a listed claim which is not listed as disputed, contingent or unliquidated as to amount, may, but need not, file a proof of claim in this case. *Creditors whose claims are not listed or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim on or before [Insert Date]*, which date is hereby fixed as the last day for filing a proof of claim[.]

(emphasis added). While we do not suggest that the court was obligated to notify creditors in precisely this form, the comparison between this Form 16 notice and the notice actually given in this case suggests the dramatic ambiguity of the latter. This ambiguity is exacerbated by the fact that the notice was simply and inconspicuously labeled "Bar date" without any reference to its significance as a deadline for the filing of proof of claims. Even persons experienced in bankruptcy might confuse such a label for other deadlines. For example, the term "bar date" is also

used to describe the deadline for filing objections to a debtor's discharge under Rule 4007(c).

The uncontroverted evidence below established that while Berlin was an experienced businessman, he had no experience or expertise in bankruptcy. Thus, even if he could be attributed with having seen the "Notice for Meeting of Creditors" he should not necessarily have been attributed with understanding the significance of the date contained therein. This factor, when taken with Richards' representations regarding the filing deadline, and the peculiar and inconspicuous placement of the bar date in a notice regarding a creditor's meeting convince us that the bankruptcy court unjustifiably punished the plaintiffs for the sins and neglect of their lawyer.

Turning back to the *Dix* factors, the bankruptcy court specifically found that there would be no prejudice to the debtor as a result of the delay in plaintiffs' filing, that the delay would not be disruptive of efficient court administration, and that there was no bad faith or culpable conduct on the part of the plaintiff partnerships. As described above, we find that the court erred in attributing the negligence of plaintiffs' attorney to the partnerships. Further, since Richard's negligence was responsible for the twenty-day delay in filing, and since the plaintiffs, through Berlin, specifically asked counsel regarding the filing deadline and were assured there was no problem, we do not find the fact that timely filing was not beyond the control of the plaintiffs to be determinative.

In sum, then, four of the five *Dix* factors weight unequivocally in favor of the plaintiffs. Further, this court in the context of default judgments has held that absent prejudice to the plaintiff or culpable conduct on the part of the defendant, the policy of hearing claims on the merits weighs in favor of allowing the claims

to go forward. *See INVST Financial Group*, 815 F.2d at 398-99. As the court put it, "Default judgments should not be used to discipline attorneys; it is the client who suffers by being deprived of his day in court." *Id.* at 400. We find the same considerations should guide us when analyzing the impact of a failure to meet a filing deadline for proof of claims if the fault is clearly attibutable to the attorney, and no prejudice results to the debtor.

III.

For the aforementioned reasons, the decision of the district court affirming the bankruptcy court's decision refusing to accept the plaintiffs' late proof of claims is *REVERSED* and *REMANDED* for further proceedings consistent with this opinion.

APPENDIX S — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PIONEER INVESTMENT SERVICES COMPANY'S PETITION FOR REHEARING FILED OCTOBER 28, 1991

No. 90-6339

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
OCT 28, 1991
LEONARD GREEN, CLERK

IN RE: PIONEER INVESTMENT SERVICES COMPANY,
Debtor

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, ET AL.,
Plaintiffs-Appellants,

v.

PIONEER INVESTMENT SERVICES COMPANY
Defendant-Appellee.

ORDER

BEFORE:
JONES and NORRIS, Circuit Judges; and JOINER,* Senior United States District Judge.

---

* Hon. Charles W. Joiner sitting by designation from the Eastern District of Michigan.

Appendix S

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel. The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

No. 91-1695

Supreme Court, U.S.
FILED
JUL 30 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

PIONEER INVESTMENT SERVICES, COMPANY,
Petitioner,

vs.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP and WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Respondents, claimants in Petitioner's chapter 11 case, received actual notice of the deadline fixed by the bankruptcy court for filing proofs of claim (the "Bar Date") at least three (3) months before the expiration of the Bar Date. Respondents retained experienced bankruptcy counsel and provided him with a complete copy of their file on Petitioner's chapter 11 case, including the written notice of the Bar Date, at least one and one-half (1 1/2) months before the expiration of the Bar Date. Respondents did not file their proofs of claim and they did not file a motion for an extension of time within which to do so before the expiration of the Bar Date. Twenty (20) days after the expiration of the Bar Date, Respondents filed a motion to extend the time to file their proofs of claim. Respondents claimed that their failure to timely file their proofs of claim was the result of excusable neglect. Respondents' claim of excusable neglect was based solely on the ground that their bankruptcy counsel had experienced a disruption in his practice, as a result of his withdrawal from his then firm, and that his file on Petitioner's chapter 11 case was unavailable to him. The questions presented are:

1. Whether the interpretation of excusable neglect, that the failure to timely perform was due to circumstances beyond the reasonable control of the party, which has been adopted and applied by another circuit court of appeals, should be established by the Court as the proper interpretation of excusable neglect under Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure.

2. Whether the interpretation of excusable neglect adopted by the United States Court of Appeals for the Sixth Circuit, which conflicts with the decisions of five other circuit courts of appeals because it considers factors other than the Respondents' actions, contravenes the clear congressional intent which requires the filing of a proof of claim within established time limits and precludes

courts from finding exceptions based on general equitable considerations.

3. Regardless of which of the two interpretations of excusable neglect is applied, whether Respondents established excusable neglect, under either interpretation, within the meaning of Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure, to allow them to file their proofs of claim after the expiration of the Bar Date, where the uncontroverted facts establish that Respondents' failure to timely file their proofs of claim resulted solely from the negligence of their bankruptcy counsel and his indifference to the Bar Date.

LIST OF PARTIES

The petitioner, Pioneer Investment Services Company, was a debtor-in-possession in a chapter 11 case. The respondents are Brunswick Associates Limited Partnership, Clinton Associates Limited Partnership, Ft. Oglethorpe Associates Limited Partnership, and West Knoxville Associates Limited Partnership, all holders of unsecured pre-petition claims against Pioneer Investment Services Company.

CORPORATE PARTY'S AFFILIATION

Petitioner has no parent companies, subsidiaries (other than wholly-owned subsidiaries) or affiliates.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, entered on September 6, 1991, is reported at 943 F. 2d 674 and is reprinted in the Joint Appendix separately filed ("App.") at 188a. The unreported opinion of the district court, entered on September 12, 1990, affirming the June 8, 1990 decision of the bankruptcy court, is reprinted in the Joint Appendix. App. at 178a. The unreported opinion of the bankruptcy court, entered on June 8, 1990, after remand from the district court, is reprinted in the Joint Appendix. App. at 163a. The unreported opinion of the district court, entered on February 20, 1990, affirming in part, reversing in part, and remanding the matter to the bankruptcy court, is reprinted in the Joint Appendix. App. at 151a. The original opinion of the bankruptcy court is reported at 106 B.R. 510 and is reprinted in the Joint Appendix. App. at 115a. The order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's petition for rehearing is reprinted in the Joint Appendix. App. at 200a.

STATEMENT OF JURISDICTION

Respondents filed their motion to extend the time to file their proofs of claim on August 23, 1989. The bankruptcy court had jurisdiction of Respondents' motion pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. The bankruptcy court conducted an evidentiary hearing on September 14, 1989, and entered an opinion and order denying Respondents' motion on October 10, 1989. Respondents filed a notice of appeal on October 20, 1989. The opinion and order of the United States District Court for the Eastern District of Tennessee, affirming in part, reversing in part and remanding the matter to the bankruptcy court, were entered on February 20, 1990. On remand, the bankruptcy court entered an opinion and order June 20, 1990, *nunc pro tunc* to June 8, 1990, again denying Respondents' motion. Respondents filed a notice of

appeal on June 15, 1990. The opinion and order of the United States District Court for the Eastern District of Tennessee, affirming the June 8, 1990 decision of the bankruptcy court, were entered on September 12, 1990. Respondents filed a notice of appeal on October 10, 1990. The opinion of the United States Court of Appeals for the Sixth Circuit, reversing the September 12, 1990 decision of the district court, was entered on September 6, 1991. On October 28, 1991, the United States Court of Appeals for the Sixth Circuit denied Petitioner's timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This case involves 11 U.S.C. § 1111 and Rules 2002, 3003 and 9006 of the Federal Rules of Bankruptcy Procedure.

Section 1111 of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2579, codified at 11 U.S.C. § 1111(a), provides:

> A proof of claim or interest is deemed filed under section 501 of this title for any claim . . . that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim . . . that is scheduled as disputed, contingent, or unliquidated.

Rule 2002 of the Federal Rules of Bankruptcy Procedure provides, in pertinent part:

> Except as provided in subdivisions (h), (i) and (l) of this rule, the clerk or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees

> not less than 20 days notice by mail of
>
> * * *
>
> (8) the time fixed for filing proofs of claims pursuant to Rule 3003(c).

Rule 3003(c)(2) and (3) of the Federal Rules of Bankruptcy Procedure provide:

> (2) Any creditor or equity security holder whose claim or interest is not scheduled or is scheduled as disputed, contingent, or unliquidated shall file a proof of claim. . .within the time prescribed by subdivision (c)(3) of this rule; and any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.
>
> (3) the court shall fix and for cause shown may extend the time within which proofs of claim. . . may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), and (c)(4).

Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure provides:

> except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or order of the court, the court for cause shown may at any time in its discretion

> (1) with or without motion or notice enlarge the period if the request therefore is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

STATEMENT OF THE CASE

On April 12, 1989, Petitioner filed its voluntary petition for relief under chapter 11 of Bankruptcy Code, App. at 13a, and a list of its twenty largest unsecured creditors. App. at 19a. This list included all of the Respondents except Ft. Oglethorpe Associates Limited Partnership ("Ft. Oglethorpe"). *Id.*

Petitioner sought and obtained from the bankruptcy court an extension of time through May 17, 1989, within which to file its schedules of assets and liabilities and statement of financial affairs.

On April 13, 1989, the clerk of the bankruptcy court mailed a Notice for a Meeting of Creditors (the "Notice") to interested parties. App. at 29a. The Notice set May 5, 1989, as the date for the meeting of creditors required by 11 U.S.C. § 341 and fixed August 3, 1989, as the Bar Date for creditors to file proofs of claim. *Id.* The notice provided, in pertinent part:

> You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 U.S.C. § 1111 and Bankruptcy Rule 3003.

> Bar Date is August 3, 1989.

The first meeting of creditors actually was held on May 19, 1989, and it was adjourned. On May 18, 1989, Petitioner filed its statement of financial affairs and schedules of assets and liabilities. App. at 1a. Respondents were not listed on Petitioner's original schedules. On May 25, 1989, Petitioner filed its amended schedules. App. at 1a. Petitioner did not list Ft. Oglethorpe on its amended schedules, and it listed the claims of the other Respondents as disputed, contingent and unliquidated.

On June 5, 1989, the United States Trustee appointed the Chapter 11 Creditors Committee. One of the Respondents, Clinton Associates Limited Partnership ("Clinton"), was a member of the committee from its inception.

Mark A. Berlin ("Berlin"), an experienced businessman, attorney and certified public accountant, was the president of Robriste Enterprises, Inc., the corporate general partner of all Respondents except Ft. Oglethorpe, and he was the president of Pudding Enterprises, Inc., the corporate general partner of Ft. Oglethorpe. App. at 34a. Prior to May 5, 1989, Berlin received and read the April 13, 1989 Notice for a Meeting of Creditors. App. at 88a-89a.

On June 16, 1989, the adjourned first meeting of creditors was held. Berlin appeared on behalf of all of the Respondents just as he had at the initial meeting of creditors on May 19, 1989. Marc Richards ("Richards"), who was retained as counsel for all of the Respondents in mid-June, 1989, App. at 39a, 83a, also appeared on behalf of all of the Respondents at the adjourned meeting of creditors on June 16, 1989.

Richards was an experienced bankruptcy attorney. App. at 57a-58a. At the time Respondents retained Richards, Berlin provided

Richards with a complete copy of Respondents' file on Petitioner's chapter 11 case. App. at 91a-92a. The file contained the April 13, 1989 Notice for a Meeting of Creditors. App. at 91a. Berlin retained a complete copy of Respondents' file. App. at 92a. Richards reviewed Respondents' file prior to the June 16, 1989 adjourned meeting of creditors. App. at 57a, 143a.

Respondents neither filed their proofs of claim nor a motion for an extension of time within which to do so before the August 3, 1989 Bar Date. On August 23, 1989, twenty (20) days after the expiration of the Bar Date, Respondents filed a motion to extend the time to file their proofs of claim. App. at 31a.

Respondents claimed, in their motion, that their failure to timely file their proofs of claim was the result of excusable neglect. Respondents made only one argument, which focused on their actions and the reasons for those actions, to support their claim. Respondents argument was that Richards had experienced a disruption in his practice in late July, 1989, as a result of his withdrawal from his then firm, and that his file was unavailable to him. App. at 39a, 56a-57a. However, Respondents and Richards failed to explain why Richards simply did not request a copy of the duplicate file from Berlin. App. at 93a.

After an evidentiary hearing, the bankruptcy court held that Respondents had failed to prove excusable neglect within the meaning of Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure ("Rule 9006(b)(1)"), and denied Respondents' motion. App. at 115a. The bankruptcy court, relying on the decision of the United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit") in *In re South Atlantic Financial Corp.*, 767 F.2d 814 (11th Cir. 1985), *cert. denied sub nom. Biscayne 21 Condominium Associates, Inc. v. South Atlantic Financial Corp.*, 475 U.S. 1015 (1986), held that, in order to establish excusable neglect, Respondents had to prove that their failure to timely file

their proofs of claim was due to circumstances beyond their reasonable control. App. at 128a. The bankruptcy court, relying on the decisions of the United States Court of Appeals for the Third Circuit (the "Third Circuit") in *In re Vertientes*, 845 F.2d 57 (3rd Cir. 1988); of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") in *Maressa v. A.H. Robins Co.*, 839 F.2d 220 (4th Cir. 1988); and, by analogy, of this Court in *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988), held that an extension of time under Rule 9006(b)(1) could not be granted for equitable reasons such as no prejudice to the debtor and lack of impact on efficient court administration. App. at 131a.

On Respondents' initial appeal to the district court, the district court reversed in part, and held that the more liberal interpretation of excusable neglect, as stated by the Ninth Circuit Bankruptcy Appellate Panel in *In re Dix*, 95 B.R. 134 (9th Cir. B.A.P. 1988), should apply in determining whether Respondents failure to timely file their proofs of claim was the result of excusable neglect. App. at 158a. The district court remanded the matter to the bankruptcy court for reconsideration of Respondents' motion under the more liberal interpretation of excusable neglect, cautioning that the decision of the bankruptcy court would be reversed only for an abuse of discretion. App. at 160a.

On remand, the bankruptcy court applied the undisputed facts of the case to the *Dix* factors and, again, concluded that the Respondents had failed to prove excusable neglect. App. at 163a. The bankruptcy court found that the delay would not prejudice Petitioner, that the length of the delay would not adversely impact efficient court administration, and that Respondents had acted in good faith. App. at 168a, 169a, 170a. However, the bankruptcy court found that the delay was not beyond the reasonable control of the Respondents and that it was appropriate to penalize Respondents for Richards' neglect. App. at 169a, 170a-172a. Finally, the bankruptcy court found that Respondents' failure to

timely file their proofs of claim resulted not only from Richards' negligence, but also from his indifference to the Bar Date. App. at 172a.

The bankruptcy court, after making these findings of fact, concluded that more weight must be accorded to the facts found against the Respondents, stating "For this Court to hold that the partnerships' late-filed claims are to be allowed as timely filed, notwithstanding that both the partnerships and their attorney had actual knowledge of the August 3, 1989 claims' bar date and ample time to file proofs of claims, would render nugatory the fixing of the claims' bar date in this case." App. at 172a173a.

The bankruptcy court, on the issue of whether Respondents should be penalized for Richards' negligence, distinguished the facts of this case from the facts of the *Dix* case. In *Dix*, unlike this case, the creditor did not have actual knowledge of the bar date prior to its expiration. App. at 174a. Also, and perhaps more importantly, the attorney, whose negligence was sought to be attributed to the claimant in *Dix*, was the attorney for the debtor, not the claimant. *In re Dix*, 95 B.R. 134, 139 (9th Cir. B.A.P. 1988).

On Respondents' second appeal to the district court, the district court affirmed. App. at 178a. The district court held that none of the bankruptcy court's findings of fact were erroneous, and that the bankruptcy court's conclusion "was one legitimately within the discretion accorded to the bankruptcy court." App. at 182a.

On appeal, the United States Court of Appeals for the Sixth Circuit (the "Court of Appeals") reversed the decision of the district court, affirming the decision of the bankruptcy court, denying Respondents' motion to file their proofs of claim late. App. at 188a. The Court of Appeals agreed with the district court's conclusion, that the more liberal interpretation of excusable neglect, as stated in *Dix*, should apply, stating ". . . we believe the *Dix* factors should be

applied as aids for case-by-case adjudication, rather than a necessary or complete list of the factors to be considered. App. at 195a.

However, the Court of Appeals reversed the district court's holding that the bankruptcy court did not abuse its discretion in denying Respondents' motion to file their proofs of claim after the expiration of the Bar Date. App. at 196a. The Court of Appeals rested its decision squarely on its conclusion that "it [the Bankruptcy Court] inappropriately penalized the plaintiffs [Respondents] for the errors of their counsel." *Id.* at 196a. The Court of Appeals, solely on the basis of this conclusion, then determined that four of the five *Dix* factors weighed in favor of the Respondents. *Id.* at 198a. The Court of Appeals also held that allowing the Respondents to file their claims late would result in no prejudice to Petitioner. *Id.* at 199a.

On September 20, 1991, Petitioner timely filed its motion for rehearing and its suggestion for rehearing in banc. Pioneer argued that the Court of Appeals' decision, adopting the more liberal interpretation of excusable neglect, as stated in *Dix*, clearly conflicted with the decision of the Eleventh Circuit in *South Atlantic*, and that its consideration of equitable factors, such as no prejudice to the debtor, was in conflict with the decisions of the Third Circuit in *Vertientes*, the Fourth Circuit in *Maressa*, and the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") in *In re Robintech, Inc.*, 863 F.2d 393 (5th Cir. 1989), *cert. denied sub nom. Bullock v. Oppenheim Appel, Dixon & Co.*, 493 U.S. 811 (1989).

Pioneer also argued that the Court of Appeals' holding that the bankruptcy court inappropriately penalized Respondents for the errors of their counsel, was, as a matter of law, in direct conflict with the decision of this Court in *Link v. Wabash Railroad Company*, 370 U.S. 626 (1962), *reh. denied.*, 371 U.S. 873 (1962). In *Link*, this

Court held that a party could not avoid the consequences of the acts or omissions of its attorney because "any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' " *Id.* at 633-634.

Finally, Pioneer argued that the facts of this case clearly were distinguishable from the facts in the *Dix* case. The critical distinction between the *Dix* case and this case is that in the *Dix* case, the attorney, whose negligence was sought to be attributed to the claimant, was not the attorney for the claimant - he was the attorney for the debtor. Understandably, the court in *Dix* held that the claimant should not be penalized for the negligence of the debtor's attorney. Here, however, Richards was not the attorney for the Petitioner, he was the attorney for the Respondents. Accordingly, it was appropriate, as the bankruptcy held, to penalize the Respondents for Richards' negligence.

On October 28, 1991, the Court of Appeals denied Petitioner's motion for rehearing and suggestion for rehearing in banc.

On January 27, 1992, Petitioner timely filed its petition for a writ of certiorari. On June 15, 1992, the Court granted Petitioner's petition.

SUMMARY OF ARGUMENT

The Court of Appeals in this case adopts an interpretation of excusable neglect under Rule 9006(b)(1) which is inconsistent with and does violence to the plain language of the rule. Under Rule 9006(b)(1), a creditor, who has actual notice of the Bar Date and sufficient time to act, but fails to do so, may file a proof of claim, after the expiration of the Bar Date, if the creditor's *failure to act* is

the result of excusable neglect. Contrary to the plain language of Rule 9006(b)(1), the Court of Appeals, in its opinion, focuses on and sanctions consideration of factors other than the creditor's actions and the reasons for those actions, in deciding whether the failure to timely file a proof of claim is the result of excusable neglect. The Court of Appeals holds, in effect, that mere inadvertence or neglect of counsel establishes excusable neglect under Rule 9006(b)(1).

The Court of Appeals unambiguously holds that it was inappropriate for the bankruptcy court to penalize the Respondents for the negligence of their counsel and his indifference towards the Bar Date. Implicit in this holding, are the propositions that a creditor may avoid the consequences of the omissions of the creditor's counsel, and that reliance on counsel is excusable neglect for a late filing of a proof of claim. These holdings are in clear and direct conflict with the holdings of this Court that a party "is deemed bound by the acts of his lawyer-agent . . . ", *Link v. Wabash Railroad*, 370 U.S. 626, 634 (1962), and that ". . . reliance [by a lay person on an attorney] cannot function as a substitute for compliance with an unambiguous statute." *United States v. Boyle*, 469 U.S. 241, 251 (1985).

The precise questions before this Court, therefore, are whether the Court of Appeals erred by holding (i) that mere inadvertence or neglect of counsel constitutes excusable neglect under Rule 9006(b)(1); (ii) that it was inappropriate to penalize the Respondents for the negligence of their counsel; and (iii) that the bankruptcy court abused its discretion by denying Respondents' motion to file their proofs of claim late under the undisputed facts. Petitioner submits that the Court of Appeals erred, and that its decision should be reversed with instructions to reinstate the original memorandum opinion and order of the bankruptcy court.

Section 1111 of the Bankruptcy Code, 11 U.S.C. §1111(a)

("§ 1111(a)") requires creditors, whose claims are listed as "disputed, contingent, or unliquidated," to file a proof of claim before the expiration of the Bar Date in order to participate in a debtor's reorganization. Rule 3003(c)(2) requires such creditors, and those creditors whose claims are not listed on the debtor's schedules, to file their proofs of claim within the time fixed by the bankruptcy court pursuant to Rule 3003(c)(3). Rule 3003(c)(3) clearly and simply provides that the bankruptcy court shall fix the time within which a proof of claim must be filed.

The clear intent of Congress, in enacting §1111(a) and Rule 3003(c)(2), is to require those creditors, who must file a proof of claim, to file it before the expiration of the Bar Date. The Bar Date prompts the creditor to act, and it promotes certainty and finality in chapter 11 cases. Rule 9006(b)(1) authorizes the bankruptcy court, in the exercise of its sound discretion, to allow creditors, who have failed either to timely file a proof of claim or to move for an extension of time within which to do so before the expiration of the Bar Date, to file a claim after the expiration of the Bar Date, only in those rare instances where the creditor's failure to act was the result of excusable neglect. The overwhelming majority of courts which have considered the question have, correctly, strictly construed the term excusable neglect, and they have allowed late filings only where the creditor established that its failure to file timely is due to circumstances beyond its reasonable control.

Contrary to the position urged by the Respondents, and adopted by the Court of Appeals, courts must strictly construe the term excusable neglect, focus only on the actions of the creditor and the reasons for those actions, and allow late filings only in those rare circumstances where the failure to file timely is due to circumstances beyond the reasonable control of the creditor. Courts cannot, as the Respondents urge, and the Court of Appeals holds, excuse compliance with the Bar Date simply because the creditor relies on counsel to comply with the Bar Date, and counsel, because

of mere negligence, fails to do so. To hold, as the Court of Appeals does in this case, encourages creditors and their counsel to have a lax attitude toward the Bar Date, and destroys the objectives of the Bar Date which are to prompt the creditors to act, and to produce certainty and finality in chapter 11 cases.

The bankruptcy court, in its initial memorandum opinion, adopted a strict interpretation of excusable neglect, focused only on the actions of the Respondents, and required the Respondents to establish that their failure to timely file their proofs of claim was due to circumstances beyond their reasonable control. The bankruptcy court properly refused to consider equitable factors, such as no prejudice to Petitioner and the impact on efficient court administration. The bankruptcy court correctly concluded that because Respondents and their counsel had ample notice of the Bar Date and time to act, but failed to do so, the Respondents did not establish excusable neglect. There is no question that the Respondents had actual notice of the Bar Date and sufficient time to file their proofs of claim, that they failed to do so, and that they advanced no reason, other than the negligence of their counsel, for their failure to file timely their proofs of claim.

The Court of Appeals' holdings, that mere negligence of counsel establishes excusable neglect under Rule 9006(b)(1), and that it was inappropriate to penalize the Respondents for the negligence of their counsel and his indifference towards the Bar Date, requires bankruptcy courts to allow untimely proofs of claim whenever any sort of excuse or claim of hardship is offered by a creditor. This result cannot be tolerated because it destroys completely the objectives of prompting parties to act, and producing certainty and finality in chapter 11 cases, all of which Congress intended to promote when it enacted the Bankruptcy Code and the Bankruptcy Rules.

ARGUMENT

I.

THE BANKRUPTCY CODE AND BANKRUPTCY RULES REQUIRE CREDITORS WHOSE CLAIMS ARE SCHEDULED AS DISPUTED, CONTINGENT, OR UNLIQUIDATED, OR ARE NOT SCHEDULED, TO FILE A PROOF OF CLAIM WITHIN ESTABLISHED TIME LIMITS IN ORDER TO PARTICIPATE IN A REORGANIZATION.

The plain language of § 1111(a) requires some, but not all, creditors to file a proof of claim in order to participate in the debtor's reorganization. Section 1111(a) provides that a claim which is listed on the debtor's schedules is deemed filed except for a claim that is scheduled as "disputed, contingent or unliquidated". Rule 3003(e)(2) requires the holders of such claims, and the holders of claims that are not listed on the debtor's schedules, to file a proof of claim in order to participate in the debtor's reorganization. Because Petitioner did not schedule Ft. Oglethorpe's claim, and scheduled the other Respondents' claims "as disputed, contingent, and unliquidated," all of the Respondents were required to file a proof of claim by the Bar Date; otherwise, they were barred from participating in Petitioner's reorganization. *In re South Atlantic Financial Corporation*, 767 F.2d 814, 817 (11th Cir. 1985), *cert. denied sub nom. Biscayne 21 Condominium Associates, Inc. v. South Atlantic Financial Corp.*, 475 U.S. 1015 (1986).

Although § 1111(a) identifies those creditors who must file a proof of claim, it does not specify either the length of notice that must be given to creditors or the time within which the creditor must file a proof of claim. These subjects are addressed by the Federal Rules of Bankruptcy Procedure: Rule 2002(8) requires that

creditors be given not less than twenty (20) days notice by mail of "the time fixed for filing proofs of claim pursuant to Rule 3003(c)". Rule 3003(c)(3), which governs the time for filing a proof of claim in a chapter 11 case, provides that "[t]he court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." In this case, the bankruptcy court gave notice by mail to the Petitioner, the Respondents, and all other creditors that August 3, 1989, was the date by which creditors were required to file a proof of claim in Petitioner's chapter 11 case. Because Respondents failed to file their proofs of claim by that date, they were barred from participating in Petitioner's reorganization unless they could establish that their failure to act was the result of excusable neglect. *In re South Atlantic Financial Corporation, supra*, 767 F.2d at 817.

While Rule 3003(c)(3) authorizes the court to extend the time for filing a proof of claim for "cause shown", the authorities hold that this rule must be read in conjunction with Rule 9006 (b)(1). *In re South Atlantic Financial Corporation, supra*, 767 F.2d at 817; *In re Vertientes Ltd.*, 845 F.2d 57, 60 (3rd Cir. 1988); *In re Dix*, 95 B.R. 134, 137 (Bankr. 9th Cir. 1988); *Brunswick Associates Limited Partnership, et al. v. Pioneer Investment Services Company, (In re Pioneer Investment Services Company)*. App. at 192a.

Rule 9006(b)(1) provides, in pertinent part, that "when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of the court, the court for cause shown may at any time in its discretion . . . (2) on motion made *after* the expiration of the specified period permit the act to be done where the *failure to act* was the result of excusable neglect." (Emphasis supplied). The authorities, consistent with the plain language of Rule 9006(b)(1), unanimously hold that when a party moves for an extension of time *after* the expiration of the specified period, the movant must show that its *failure to act* was a result of excusable neglect. *In re South Atlantic Financial Corp.*,

supra, 767 F.2d at 817; *In re Vertientes, supra*, 845 F.2d at 59; *Brunswick Associates Limited Partnership et al., The Pioneer Investment Services Company, (In re Pioneer Investments Services Company)*. App. at 193a.

Before considering the unsettled question of what elements must be present to constitute excusable neglect, it is first necessary to examine the congressional intent to require creditors to timely file a proof of claim that underlies the provisions of the Bankruptcy Code and Bankruptcy Rules. The determination of what elements constitute excusable neglect under Rule 9006(b)(1) can be made only after the congressional intent is clearly defined and its significance is understood.

A. The Bar Date Prompts Creditors To Act And Promotes Certainty And Finality In Chapter 11 Cases.

The intent of Congress that underlies the Bar Date is readily apparent from an examination of the claims filing process as it existed in cases under chapter XI of the Bankruptcy Act.

In Hoos & Co. v. Dynamics Corp. of America, 570 F.2d 433 (2nd Cir. 1978), the court, in tracing the history of the claims filing process in cases under chapter XI of the Bankruptcy Act, stated:

> Prior to 1963, creditors were not required to file a proof of claim to participate in a chapter XI arrangement. In 1963, a filing requirement was imposed. Chapter XI creditors generally were given only 6 months after the first meeting of creditors to file a proof of claim. Bankruptcy Act 355, Pub. L No. 88 175, § 2, 77 Stat. 330 (1963). This period was extended up to the time of confirmation by the 1967 amending legislation, Pub. L No. 90-156, § 2,

> 81 Stat. 510 (1966), and remains substantially the same for the purposes of this case under current law. See note 16. The purpose of this legislation is explained in the report of the House Committee on the Judiciary:
>
> In 1963, the Congress enacted an amendment to Bankruptcy Act (Public Law 88-175) which required that creditors file their claims in order to participate in distributions under chapter XI of the Bankruptcy Act. It also required that such claims must be filed within 6 months. The 1963 amendment corrected the prior practice of making distribution solely on the basis of the debtor's schedule which had permitted the filing of inflated or fictitious debts. The purpose of the 1963 legislation was to assure that distributions would be made on the basis of a comparative examination of the debtor's schedules with the claims of the creditors. By limiting the time in which creditors could file such claims, the 1963 amendments intended to assure expedition in the administration of chapter XI cases.
>
> The objectives of the 1963 legislation were salutary. However, the committee has learned that the time limitations imposed have created difficulties and confusion where reasonable certainty previously existed. H.R. 2519 retains the objectives of Congress as expressed in 1963 by permitting only those creditors who filed claims to participate under the arrangement. However, in order to avoid imposing onerous and unrealistic burdens on

creditors which may prevent them from participating and thereby provide a windfall or undeserved benefit to the debtor, the bill enables creditors to file their claims up to the date of confirmation.

. . . The principle of the 1963 amendment to chapter XI with respect to filing of creditor claims is retained by the bill. Creditors are still required to file a claim to participate. Two exceptions to the requirement that the claims be filed by the date of confirmation are (1) a claim arising from the rejection of an executory contract of the debtor may be filed within such time as the court may allow, and (2) a claim may be filed late by a creditor - that is, after date of confirmation - is scheduled by the debtor, but in that case shall not be allowed in an amount in excess of that set forth in the debtor's schedules.

H.R. 2519 would restore the laws that existed prior to the 1963 amendment except that it would carry out the Congressional objective of that amendment by requiring every creditor to file a claim before being permitted to participate under a confirmed arrangement. Furthermore, the bill would protect creditors listed on the debtor's schedule who failed to file their claims within the specified period and thus prevent the debtor from obtaining an undeserved windfall. The bill would also protect holders of claims that arise from the rejection of executory contracts.

H.R. Rep. No. 122, 90th Cong., 1st Sess. (1967) (reprinted in S. Rep. No. 751, 90th Cong., 1st Sess. (1967), U.S. Code Cong. & Admin. News 1967, p. 1996, See 9 Collier on Bankruptcy, *supra*, at ¶¶ 7.09[3]-.09[3.1] & 7.25(6).

Id. at 437-438 n. 15.

The court concluded that "[T]his clear Congressional intent to require filing of valid proofs of claim within the time limits that it has set is sufficient to preclude us from finding exceptions to these rules in the supposed interest of equity." *Hoos & Co. v. Dynamics Corp. of America, supra,* 570 F.2d at 439. The court stated further "[T]hus, however much we would like to permit the bankruptcy court to consider in a particular case, including this one, whether it would 'equitable' to permit late filing of a scheduled claim, to do so would put the bankruptcy courts in the unenviable position of indefinitely having to consider claims whenever some sort of excuse is asserted. Such a procedure would destroy the objective of finality which Congress obviously intended to promote." *Id.* at 439.

The decision in *Hoos & Co.* demonstrates that, under the Bankruptcy Act, Congress expressed a clear intent to require creditors to file a proof of claim within the time limits that it established to assure expedition in the administration of chapter XI cases, and to promote certainty and finality.

The plain language of § 1111(a) and Rule 3003(c)(2) show that the congressional intent, to require creditors to file a proof of claim within the time limits that it has set, was carried over to and applies with equal force under the Bankruptcy Code and Bankruptcy Rules.

In cases decided under the Bankruptcy Code and the Bankruptcy Rules, the courts uniformly have recognized the

congressional intent that underlies the Bar Date and its objectives of prompting creditors to act, and producing certainty and finality in the Chapter 11 cases. *In re South Atlantic Financial Corp., supra,* 767 F.2d at 817; *Maressa v. A. H. Robins,* 839 F.2d 220, 221 (4th Cir. 1988); *In re Vertientes, Ltd., supra,* 845 F.2d at 60-61; *In re Robintech, Inc.,* 863 F.2d 393, 398 (5th Cir. 1989), *cert. denied sub nom. Bullock v. Oppenheim, Appel, Dixon & Co.,* 493 U.S. 811 (1989).

B. The Deadline For Filing A Proof Of Claim Must Be Strictly Enforced; Otherwise, The Objectives That Congress Intended To Promote Will Be Destroyed.

While the Court of Appeals in this case acknowledges the intent of Congress and the objectives that it promotes, the Court of Appeals, in the end, completely ignores it. The Court of Appeals rejects the well established proposition that the proper interpretation of excusable neglect is a strict one, and abandons it in favor of an interpretation which encourages a lax attitude toward the Bar Date, and destroys the very objectives which Congress intended to promote.

Although the specific provisions of the Bankruptcy Code and Bankruptcy Rules differ from the provisions of the Bankruptcy Act concerning the time when a proof of claim must be filed, and the creditors who must file a proof of claim in order to participate in a debtor's reorganization, the Bankruptcy Code and the Bankruptcy Act share the same congressional intent that underlies the establishment of a Bar Date and the objectives that it is designed to promote.

The Bankruptcy Code and Bankruptcy Rules, like the Bankruptcy Act and the rules promulgated under it, recognize only one exception to strict compliance with the Bar Date, which is, in those rare instances, where the creditor establishes that the failure to timely file a proof of claim is the result of excusable neglect. As

discussed below, the elements that constitute excusable neglect must focus exclusively on the actions of the creditor and the reasons for those actions, and the interpretation of excusable neglect must be strict. A strict interpretation of excusable neglect reaches the result that Congress intended: it allows the late filing of a proof of claim under extraordinary circumstances where the creditor, through no fault of his own, does not timely file, and, at the same time, it does not allow the objectives that Congress intended to promote to be swept away by a raging and endless stream of vague excuses and supposed claims of hardship.

As this Court recently observed, "[D]eadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." *Taylor v. Freeland & Kronz,* _____U.S._____, 112 S. Ct. 1644, 1648 (1992). While deadlines, like the Bar Date, are arbitrary fixed dates, and have harsh effects, they nevertheless are essential to accomplish a necessary result. *United States v. Boyle,* 469 U.S. 241, 249 (1985). In Chapter 11 cases, the Bar Date prompts creditors to act, or be forever barred from participating in the debtor's reorganization, and it is essential to accomplish certainty and finality. *Maressa v. R. H. Robins Co., supra,* 839 F.2d at 221.

The decisions of this Court establish that if a filing deadline is to have any content, the deadline must be enforced. *United States v. Locke,* 471 U.S. 84, 101 (1985). This Court has expressly held that "[A]ny less rigid standard would risk encouraging a lax attitude toward filing dates." *United States v. Boyle, supra,* 469 U.S. at 249. Accordingly, this Court has not hesitated to enforce filing deadlines because the failure to do so would result "in a cascade of exceptions that would engulf the rule erected by the filing deadline. . ." *United States v. Locke, supra,* 471 U.S. at 101.

The interpretation of the term excusable neglect, which is a limited exception to the absolute enforcement of the deadline created by the Bar Date, must be made with these principles firmly

in mind. The interpretation given to the term obviously must allow for relief in those rare and limited situations where relief is intended. On the other hand, the term cannot be interpreted so liberally that it strips the deadline created by the Bar Date of all content and renders it meaningless. A liberal interpretation, like the one the Court of Appeals adopted in this case, renders the deadline created by the Bar Date nugatory and leads to all of the evils that this Court previously has articulated. Most importantly, it destroys completely the objectives which the deadline of the Bar Date promotes.

Petitioner submits, therefore, that the term excusable neglect must be narrowly and strictly interpreted. A narrow and strict interpretation of excusable neglect preserves the integrity of the deadline created by the Bar Date and promotes the objectives that Congress intended when it enacted the rule.

II.

THE HOLDINGS OF THE COURT OF APPEALS, THAT MERE INADVERTENCE OR NEGLECT OF COUNSEL ESTABLISHES EXCUSABLE NEGLECT, AND THAT RELIEF MAY BE BASED ON EQUITABLE CONSIDERATIONS, ARE INCONSISTENT WITH THE DECISIONS OF EVERY OTHER COURT OF APPEALS THAT HAS CONSIDERED THESE ISSUES.

The decision of the Court in this case has important and far reaching consequences for our system of representative litigation. The term excusable neglect appears not only in Rule 9006(b)(1), but also in Rule 6(b)(2), Federal Rules of Civil Procedure ("Rule 6(b)(2)") and in Rule 4(a)(5), Federal Rules of Appellate Procedure ("Rule 4(a)(5)"). Thus, this Court's interpretation of excusable neglect will govern all situations in bankruptcy cases, civil cases

and appeals, where a party seeks relief from enforcement of a deadline on the claim that the failure to act was the result of excusable neglect.

Because Rule 9006(b)(1), like Rule 6(b)(2) and Rule 4(a)(5), extends the time for the doing of an act where *the failure to act* is the result of excusable neglect, it is obvious that the focus of these rules is on and limited to the movant's actions and the reasons for those actions. The effect that an extension has on the other party is not, as the Court of Appeals holds in this case, a relevant inquiry. If it were, then extensions of time would be granted routinely, and deadlines would not be enforced, where there is no perceived prejudice to the other party, regardless of the reasons for the movant's failure to act.

The bankruptcy court, consistent with the decision of the Eleventh Circuit in *In re South Atlantic Financial Corp.*, held that the respondents had the burden to show that "the failure to timely perform a duty was due to circumstances which were beyond the reasonable control of the person whose duty it was to perform." *In re South Atlantic Financial Corp., supra,* 767 F.2d at 817; *In re Pioneer Investment Services Company.* App. at 128a.

Following the decision of the Eleventh Circuit in *In re South Atlantic Financial Corp.*, the bankruptcy court, in its original memorandum opinion, focused exclusively on the Respondents' actions and the reasons for those actions. The bankruptcy court, after hearing the evidence, concluded that the Respondents' failure to act was not the result of excusable neglect. The bankruptcy court strictly construed the term excusable neglect, and resisted the temptation to grant Respondents' motion on the grounds of general equitable considerations, recognizing that "it cannot judicially expand Rule 9006(b)(1) to add a ground for extending the time to perform an act within a specified period based upon general equitable considerations." App. at 131a.

The correctness of the bankruptcy court's holding, that Respondents had the burden of proof to establish excusable neglect, cannot be questioned. The bankruptcy court's strict interpretation of excusable neglect under Rule 9006(b)(1) is consistent not only with the decisions of the overwhelming majority of the courts which have interpreted the term under Rule 9006(b)(1), but also with the decisions of the courts which have interpreted the term under Rule 6(b)(2) and Rule 4(a)(5). *In re South Atlantic Financial Corp., supra; In re Vertientes Ltd., supra; Maressa v. A. H. Robbins, supra; In re Robintech, supra,* (Rule 9006(b)(1)); *In re City of Philadelphia Litigation,* 123 F.R.D. 515, 520 (E.D. Pa. 1988) (Rule 6(b)(2)); *Chisper v. Kohlmeyer & Co.,* 600 F. 2d 1061, 1065 (5th Cir. 1979); *State of Oregon v. Champion International Corp.,* 680 F. 2d 1300, 1301 (9th Cir. 1982); *Reinsurance Co. of America, Inc. v. Admistratia,* 808 F.2d 1249, 1251 (7th Cir. 1987) (Rule 4(a)(5)).

The bankruptcy court's and the Eleventh Circuit's interpretation of excusable neglect under Rule 9006(b)(1), as requiring the movant to show that "the failure to timely perform a duty was due to circumstances beyond the reasonable control of the person whose duty it was to perform", is consistent with the interpretation given by the courts to the identical term under Rule 6(b)(2) and Rule 4(a)(5). *McLaughlin v. City of LaGrange,* 662 F.2d 1385, 1387-1388 (11th Cir. 1981), *cert. denied,* 456 U. S. 979 (1982); *Graham v. Pennsylvania Railroad,* 342 F.2d 914, 915 (D.C. Cir. 1964), *cert. denied,* 381 U. S. 904 (1965) (Rule 6(b)(2)). The Second Circuit, in interpreting the term under Rule 4(a)(5), held that ". . . a finding of excusable neglect must be based either on the acts of someone other than appellant or counsel, or some extraordinary event." *650 Park Ave. Corp. v. McRae,* 836 F.2d 764, 767 (2d Cir. 1988). *See also, Spound v. Mohasco Industries, Inc.,* 534 F.d 404, 411 (lst Cir. 1976), *cert. denied,* 429 U.S. 886 (1976) ("excusable neglect calls for circumstances that are unique or extraordinary").

All of the courts which have interpreted the term excusable neglect have held, contrary to the holding of the Court of Appeals in this case, that mere inadvertence or neglect of counsel is not excusable neglect. *In re South Atlantic Financial Corp., supra,* 767 F.2d at 818, (Rule 9006(b)(1)); *McLaughlin v. City of LaGrange, supra,* 662 F.2d at 1387; *Davidson v. Keenan,* 740 F.2d 129, 132 (2d Cir. 1984), (Rule 6(b)(2)); *State of Oregon v. Champion International Corp., supra,* 680 F.2d at 1301; *650 Park Ave. Corp. v. McRae, supra,* 836 F.2d at 767 (Rule 4(a)(5)). Indeed, if excusable neglect includes a mere mistake by experienced counsel, "the requirement would be meaningless". *Spound v. Mohasco Industries. Inc., supra,* 584 F.2d at 411.

The undisputed facts of this case show that Respondent's failure to act resulted solely from (i) Richards' negligence and (ii) his indifference to the Bar Date. The holding of the Court of Appeals, that the mere negligence of Richards, an experienced bankruptcy attorney, established excusable neglect, clearly is wrong, and therefore, it must be reversed. Otherwise, the requirement of excusable neglect would be meaningless.

The Respondents had actual notice of the Bar Date and sufficient tlme to act, but failed to do so, only because of Richards' negligence. The decision of this Court in *Lujan v. National Wildlife Federation,* 497 U.S. 871 (1990), strongly suggests, but does not squarely hold, that a party cannot establish excusable neglect under these circumstances. Petitioner urges the Court to so hold now.

The district court and the Court of Appeals reversed the bankruptcy court, and declined to follow what they characterized as the "strict interpretation" of excusable neglect. Instead, the district court and the Court of Appeals adopted the interpretation of excusable neglect stated by the Bankruptcy Appellate Panel of the Ninth Circuit in *In re Dix,* 95 B.R. 134 (Bankr. 9th Cir. 1988). In *Dix,* the court set forth five factors to be considered in deciding whether

the creditor's failure to act was the result of excusable neglect. These factors are:

> (1) Whether granting the delay will prejudice the debtor;
>
> (2) The length of the delay and its impact on efficient court administration;
>
> (3) Whether the delay was beyond the reasonable control of the person whose duty it was to perform;
>
> (4) Whether the creditor acted in good faith; and
>
> (5) Whether clients should be penalized for counsel's mistake or neglect.

95 B.R. 138.

The *Dix* interpretation of excusable neglect is, for two reasons, unacceptable. First, two factors of the *Dix* test, whether granting the delay will prejudice the debtor, and the length of delay and its impact on efficient court administration, are inappropriate because Rule 9006(b)(1) does not grant a court discretion to extend the time to act simply because no prejudice would result, or for any other equitable reason. *Hoos & Co. v. Dynamics Corporation of America, supra,* 570 F.2d at 439; *In re Vertientes, supra,* 845 F.2d at 60; *Maressa v. A. H. Robbins, supra,* 839 F.2d at 221; *In re Robintech, supra,* 863 F.2d at 398; *In re South Atlantic Financial Corporation, supra,* 767 F.2d at 819. Indeed, this Court, speaking in another context, has instructed that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 206 (1988).

The Court of Appeals unambiguously holds that, in granting

Respondent's motion, "no prejudice results to the debtor." App. at 199a. The Court of Appeals, unlike the bankruptcy court and every other court of appeals that has considered the issue, has yielded to the temptation to expand Rule 9006(b)(1) to include a ground for granting an extension of time based upon general equitable considerations. Petitioner urges the Court to extend its holding in *Ahlers* to the Bankruptcy Rules, and hold, in this case, that equitable considerations cannot override the plain language of specific Bankruptcy Rules.

III.

THE HOLDING OF THE COURT OF APPEALS, THAT IT IS INAPPROPRIATE TO PENALIZE A PARTY FOR THE NEGLECT OF ITS COUNSEL, IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT.

A. A Party Is Bound By And May Not Avoid The Consequences Of The Omissions of Counsel.

The *Dix* test also is unacceptable because the fifth factor, whether clients should be penalized for counsel's mistake or neglect, must always be found against the movant. Under the decision of this Court in *Link v. Wabash Railroad,* 370 U.S. 626 (1962), *reh. denied,* 371 U.S. 873 (1962), the client, in our representative system of litigation, always is bound by the omissions of its counsel and cannot avoid them.

The decision of the Court of Appeals, that Respondents should not be penalized for the negligence of Richards, directly conflicts with the decision of this Court in *Link v. Wabash Railroad Company,* and the decisions of other courts which have understood the holding in *Link,* and faithfully followed it. *Kaercher v. Trustees of Health & Hospital of Boston,* 834 F.2d 31, 34 (1st Cir 1987); *Buckley v. United States,* 382 F.2d 611, 615 (10th Cir. 1967); *United States v. Manos,*

56 F.R.D. 655 (S.D. Ohio 1972).

In *Link*, the district court *sua sponte* dismissed plaintiff's diversity negligence action against the defendant. 370 U.S. at 627. The district court notified counsel for plaintiff and defendant of the scheduling of a pre-trial conference to be held on a date and time certain. *Id.* at 627. On the day of the pretrial conference, plaintiff's counsel did not appear. The district court dismissed the action. *Id.* at 628-629. The court of appeals affirmed. *Id.* at 629. This Court, in affirming the decision of the court of appeals, affirming the district court's dismissal of the action, stated:

> There is certainly no merit to the contention that dismissal of Petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of his freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'

Id. at 633-634.

In this case, the Court of Appeals expressly held that "it [the bankruptcy court] inappropriately penalized the plaintiffs [Respondents] for the errors of their counsel." App. at 196a. This holding is in direct conflict with the holding of this Court in *Link*. Indeed, in view of decision of this Court in *Link*, it was not only appropriate, but also mandatory, for the bankruptcy court to penalize the Respondents for the negligence and indifference of Richards.

The decision of the Court of Appeals reaches a result which this Court, thirty (30) years ago, in *Link*, prohibited, *i.e.*, visiting the sins of Respondents' counsel upon the Petitioner. 370 U.S. at 634. As this Court stated in *Link*, if counsel's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. 370 U.S. at 634. Respondents have exercised their remedy by filing a malpractice action against Richards. App. at 134a. To afford Respondents the additional relief, as the Court of Appeals would do, of being able to file their proofs of claim late, affords relief to Respondents which this Court already has held they are not entitled to receive.

B. The Failure To Timely File A Proof Of Claim Is Not Excused By The Creditor's Reliance on Counsel, And Such Reliance Is Not Excusable Neglect For A Late Filing.

The Court of Appeals found "that the partnerships [Respondents] in all likelihood relied on the expertise of their experienced bankruptcy counsel and paid no further heed to the matter." App. at 196a-197a. This holding clearly suggests that Respondents failure to timely file their proofs of claim is excused by their reliance on counsel, and that such reliance is excusable neglect for their failure to act. This holding directly conflicts with the decision of this Court in *United States v. Boyle*, 469 U.S. 241 (1985).

In *Boyle*, the executor of an estate retained counsel for the estate. 469 U.S. at 242. The executor relied on the attorney. *Id.* at 242. The executor contacted the attorney to inquire about the preparation of the estate tax return, and was assured by the attorney that it would be filed "in plenty of time". *Id.* at 243. After the deadline to file passed, the executor learned for the first time that the estate tax return was overdue. *Id.* at 243. The deadline was missed because of a clerical oversight in the attorney's office. *Id.* at 243.

The Internal Revenue Service assessed a penalty for the late filing under 26 U.S.C. § 6651(a)(1). *Id.* at 243. The executor claimed that the penalty was unjustified because his failure to file was "due to reasonable cause," *i.e.*, reliance on the attorney. *Id.* at 244. This Court, in reversing the decisions below, that reliance on the attorney was "reasonable cause", stated:

> To say that it was "reasonable" for the executor to *assume* the attorney would comply with the statute may resolve the matter as between them, but not with respect to the executor's obligations under the statute . . . that the attorney, as the executor's agent, was expected to attend to the matter does not relieve the principal of his duty to comply with the statute.

(Emphasis in original). *Id.* at 250.

This Court held:

> It requires no special training or effort to ascertain a deadline and make sure that it is met. The failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not "reasonable cause" for a late filing under 6651(a)(1). . . .

Id. at 252.

The holding of this Court in *Boyle* cannot be reconciled with the holding of the Court of Appeals in this case. That Richards, Respondents' counsel, was expected to file the proofs of claim does not relieve Respondents of their duty to comply with the Bar Date. Respondents were aware of the Bar Date. App. at 88a-89a.

Respondents failure to timely file their claims cannot be excused by their reliance on Richards, and such reliance is not excusable neglect. This is especially true in this case because "reasonable cause" under 26 U.S.C. § 6651(a)(1) obviously is a less exacting standard than "excusable neglect" under Rule 9006(b)(1).

IV.

THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION BY DENYING RESPONDENTS' MOTION TO FILE THEIR PROOFS OF CLAIM BECAUSE RESPONDENTS MADE NO EFFORT TO TIMELY FILE THEIR PROOFS OF CLAIM AND SUCH FAILURE RESULTED SOLELY FROM THE NEGLIGENCE OF RESPONDENTS' COUNSEL AND HIS INDIFFERENCE TO THE DEADLINE.

Regardless of which interpretation of excusable neglect this Court adopts, the decision of the Court of Appeals must be reversed with instructions to reinstate the judgment of the bankruptcy court and district court denying Respondents' motion to file their claims out-of-time. Under the interpretation of excusable neglect set forth in *In re South Atlantic Financial Corp.*, Respondents failed to advance any reason for failing to comply with the August 3, 1989 Bar Date that was not within their reasonable control.

Even if the interpretation of excusable neglect set forth in the *Dix* case is followed, the decision of the Court of Appeals nevertheless is erroneous and must be reversed. The only reason Respondents advanced for their failure to timely file their proofs of claim was the failure of their counsel to determine the Bar Date and to file their proofs of claim before the expiration of the Bar Date. Respondents and their counsel could have verified easily, by examination of the docket in the bankruptcy court, the Bar Date.

App. 24a. Moreover, the business representative of the Respondents, Berlin, and Respondents' counsel, Richards, both had possession of the Notice of Meeting of creditors that fixed the Bar Date and they had read it. App. at 29a, 57a, 143a. Under these circumstances, the Court of Appeals could not have found, properly, that the bankruptcy court abused its discretion in refusing to allow Respondents to file their proofs of claim after the expiration of the Bar Date.

CONCLUSION

For the above reasons, Petitioner urges this Court to reverse the Court of Appeals and reinstate the judgment of the bankruptcy court in favor of Petitioner.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PIONEER INVESTMENT SERVICES COMPANY,
Petitioner,

v.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP, AND WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

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RESTATEMENT OF QUESTION PRESENTED

Whether Respondents may file proofs of claim in a chapter 11 case a mere 20 days after the "bar date" because of "excusable neglect" as defined in Bankruptcy Rule 9006(b)(1), where the delay in filing was not in bad faith and neither prejudices the debtor nor adversely impacts administration of the case.

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(1976 Pamphlet Ed.) 20,21

II Webster's Third New Int'l Dictionary 1513 (1971) . . 8

No. 91-1695

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PIONEER INVESTMENT SERVICES COMPANY,
Petitioner,

v.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP, AND WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

On April 12, 1989, Petitioner filed for reorganization under chapter 11. (J.A. 13a). The next day, on April 13, 1989, the bankruptcy court mailed a Notice for Meeting of Creditors, which set August 3, 1989, as the Bar Date for creditors to file a proof of claim. (J.A. 29a).

Mark Berlin, president of the corporate general partners of the Respondents (who were all creditors of Petitioner), received this Notice for Meeting and attended the first adjourned creditors' meeting. (J.A. 118a). Shortly thereafter, in early June, Respondents retained as counsel Marc Richards, an experienced bankruptcy practitioner, then with the New York law firm of Myerson & Kuhn. (J.A. 120a-21a; *see* J.A. 55a-58a). Mr. Berlin and Mr. Richards together attended the second meeting of creditors on June 16, 1989. (J.A. 119a).

Despite his receipt of the Notice for Meeting, his participation in both creditors' meetings, and Respondents' representation by Mr. Richards, Mr. Berlin was not aware of the necessity of filing proofs of claim by August 3, 1989. (J.A. 97a). Although he is an attorney, Mr. Berlin had no knowledge of bankruptcy practice, (J.A. 88a), was not acting in the capacity of counsel for Respondents, and did not understand the significance of the term "bar date." (J.A. 90a, 97a). Moreover, the Notice that the bankruptcy court sent to Mr. Berlin was not in the prescribed format of

Official Bankruptcy Form 16. The Court of Appeals for the Sixth Circuit observed that the Notice was a model of "dramatic ambiguity" -- even to an experienced bankruptcy practitioner. (J.A. 197a-98a). Mr. Richards himself did not recognize August 3 as a "bar date," (J.A. 57a), nor had he ever been aware of a case in which the deadline for filing proofs of claim was set so soon after the commencement of a significant chapter 11 case. (J.A. 58a).

In July 1989, Mr. Richards and his colleagues experienced ongoing difficulties with other attorneys at Myerson & Kuhn. As a result, Mr. Richards, three other bankruptcy partners, and virtually all of the bankruptcy associates resigned from Myerson & Kuhn effective July 31, 1989 (three days before the Bar Date in this case). (J.A. 56a). After his resignation, Mr. Richards was denied access to his files until August 15, 1989. *Id.* Even then, the file for this case was missing, and Mr. Richards was told that it could not be found. (J.A. 57a).

As a result, Respondents did not timely file proofs of claim. Twenty days after the August 3 Bar Date, Respondents moved the bankruptcy court under Bankruptcy Rule 9006 for an extension of time to file proofs of claim, based on their excusable neglect. (J.A. 31a). The bankruptcy court denied this motion for an extension of time. It held that the standard for showing excusable neglect permitted an extension only if the failure to act was based on circumstances beyond Respondents' reasonable control. (J.A. 128a).

Upon appeal by Respondents, the district court reversed and remanded, holding that the bankruptcy court had not correctly applied the "excusable neglect" standard set forth in Rule 9006. (J.A. 161a, 151a). The district court remanded for the bankruptcy court to determine whether there was excusable neglect by considering the factors specified in *In re Dix*, 95 Bankr. 134, 137 (Bankr. 9th Cir. 1988). (J.A. 158a-59a). On remand, the bankruptcy court again held that Respondents had not established excusable neglect. (J.A. 176a, 163a). The bankruptcy court foreclosed Respondents from filing their proofs of claim on the grounds that: (1) the delay in filing was within the reasonable control of Respondents and (2) because the filing was within their reasonable control, Respondents should be penalized for their counsel's neglect. (J.A. 169a-72a).

Respondents again appealed to the district court. This time the district court affirmed the bankruptcy court by simply holding that the bankruptcy court did not abuse its discretion in applying the factors specified in *Dix*. (J.A. 186a, 178a). Respondents then appealed to the Court of Appeals for the Sixth Circuit, which reversed. (J.A. 188a).

The Sixth Circuit held that the district court had applied an overly rigid analysis that failed to include the flexibility mandated by Rule 9006. (J.A. 195a). The bankruptcy court abused its discretion by unjustifiably penalizing Respondents for the neglect of their lawyer, (J.A. 198a), and by effectively rendering a default judgment

against Respondents, when there was no showing of any prejudice to Petitioner. (J.A. 198a-99a).

Petitioner's plan of reorganization has been confirmed and, significantly, it makes provision for the payment of Respondents' claims, should they be allowed. (J.A. 168a-69a). The plan proposes to pay unsecured creditors 100% of their claims. (Bankr. Ct. R. 3/27/90, pp. 6, 14).

SUMMARY OF ARGUMENT

Bankruptcy Rule 3003 directs the bankruptcy court to fix the time period for filing a proof of claim in a chapter 11 reorganization. The standard for allowing proofs of claim after the bar date is supplied by Rule 9006, which governs time limits generally, not just the time limit for filing proofs of claim. Rule 9006 authorizes the bankruptcy court to extend certain time periods, even after their expiration, based upon a showing of "excusable neglect."

This Court should affirm the Court of Appeals for the Sixth Circuit by adopting a flexible standard of "excusable neglect," which is required both by the plain language of Rule 9006 and the substantive policy of the Bankruptcy Code. Petitioner urges the application of a so-called "strict" standard. This proposed standard would preclude a finding of excusable neglect whenever the failure to act was within the party's reasonable control. This result is illogical and contrary to the plain meaning of Rule 9006, which expressly employs the term "neglect." Neglect, by definition, includes

the failure to perform an act that is within a party's control. If compliance with a deadline is within a party's reasonable control, then failure to comply with the deadline will almost always be due to neglect. Under Petitioner's proposed standard, however, the neglect will never be excusable for the very same reason.

A proper interpretation of excusable neglect requires a court to focus on whether the neglect is excusable. This necessarily involves a consideration of other factors than simply whether the failure to act was beyond the reasonable control of Respondents and their counsel. There is no uniform, rigid standard of excusable neglect under Bankruptcy Rule 9006, since neglect that may be excusable in one context may not be excusable in another.

In the context of Bankruptcy Rules 3003 and 9006, which deal with extending the date for filing proofs of claim in a chapter 11 reorganization, a court should guide its inquiry into whether neglect was excusable by considering whether the delay has caused any prejudice to the debtor or to other creditors, whether the delay has adversely impacted efficient judicial administration, and whether the creditor has acted in good faith. Only by undertaking such an inquiry can the courts' application of Rule 9006 properly reflect the *substantive* goals of the Bankruptcy Code -- preservation of claims and the avoidance of unjustified windfalls.

In this case, Respondents' neglect is excusable. The delay caused no prejudice to Petitioner or other creditors. The delay had no adverse impact on efficient judicial

administration. There is no question that Respondents acted in good faith. This Court should therefore affirm the conclusion of the Court of Appeals for the Sixth Circuit that the bankruptcy court erred by ignoring the proper meaning of "excusable neglect" so as to penalize Respondents for the neglect of their attorney.

ARGUMENT

I. "EXCUSABLE NEGLECT" PRESUMES THE EXISTENCE OF NEGLECT AND CANNOT, BY DEFINITION, BE LIMITED TO CIRCUMSTANCES BEYOND A PARTY'S REASONABLE CONTROL.

Two bankruptcy rules control this appeal. Bankruptcy Rule 9006(b)(1) provides generally for extensions of certain time periods. It covers not only time extensions for filing proofs of claim but, like Federal Rule of Civil Procedure 6(b), also governs virtually all other filing requirements (other than those that are expressly excluded). Rule 9006 requires a showing of "excusable neglect" where a party attempts to obtain an extension of time after the original time period has already expired. Bankruptcy Rule 3003 specifically governs the filing of proofs of claim in a chapter 11 case. It allows courts to extend the time for filing proofs of claim upon a showing of "cause." The two Rules must be read together. *Cf. Lujan v. National Wildlife*

Federation, 497 U.S. 871 (1990) (construing Federal Rules of Civil Procedure 6(b) and 56(c)).

In this case, the bankruptcy court held that "excusable neglect" could be shown only when the missed deadline was "beyond the reasonable control" of the party or its attorney. Under this rigid approach, the deadline for filing a bankruptcy proof of claim is treated almost like a statute of limitation, and equitable factors such as the good faith of the creditor, lack of prejudice to opposing parties, and lack of impact on efficient court administration may not be considered. The *only* relevant inquiry under this strict standard becomes whether the missed deadline was "beyond the reasonable control" of the party or its attorney.

This exclusive emphasis on conduct "beyond the reasonable control" of the moving party cannot be reconciled with the language of Rule 9006. Equating "excusable neglect" with circumstances "beyond the reasonable control" of a party is a logical *non sequitur* and violates the plain meaning of Rule 9006. The words "excusable neglect" in the Rule plainly presume that some type of neglect is involved. Obviously, if accomplishing an act is beyond one's reasonable control, then there is no neglect upon a failure to act. Rule 9006 by its terms allows relief for "neglect" -- the failure to take an act within one's control.[1/] The proper focus of a definition of "excusable neglect,"

[1/] *See, e.g.*, II Webster's Third New Int'l Dictionary 1513 (1971) (definition of neglect) ("to carelessly omit doing (something that should be done) either altogether or almost altogether: . . .").

therefore, necessarily includes omissions within a party's control. The correct focus of the inquiry is a consideration of whether any such neglect is "excusable."

The Third Circuit has recognized this principle in reviewing the decision of a district court that had denied an extension of time for filing a notice of appeal under Federal Rule of Appellate Procedure 4(a). *Consolidated Freightways Corp. v. Larson*, 827 F.2d 916, 918-19 (3d Cir. 1987), *cert. denied sub. nom.*, *Consolidated Freightways Corp. v. Secretary of Transportation*, 484 U.S. 1032 (1988). In *Consolidated Freightways*, the district court had interpreted Rule 4(a)(5) to establish a "*per se* rule that whenever counsel had, or should have had, 'control' over the underlying error, such error could not, as a matter of law, constitute excusable neglect." 827 F.2d at 918. The court of appeals rejected this illogical definition and held:

> We find it clear from the language of Rule 4(a) itself that the concept of excusable neglect encompasses more than acts, omissions, or events beyond the control of appellant and appellant's counsel. . . .
>
> By limiting applicability of the excusable neglect exception to errors beyond counsel's control, the district court ignored Rule 4(a)(5)'s purpose of excusing 'neglect.'

827 F.2d at 919.

The Third Circuit properly rejected the strict standard now advocated by Petitioner and held that "excusable

neglect" requires a case-by-case analysis. *Id.* Based on this interpretation, which is more logical and more faithful to the Rule's terms, the court compiled a list of factors to be considered in the analysis of "excusable neglect."[2/]

The excusable neglect standard in Bankruptcy Rule 9006 necessarily involves a determination of whether any neglect is excusable. That determination may vary according to the nature of the time extension requested. If excusable neglect were always defined by the rigid "beyond-the-reasonable-control" standard urged by Petitioner, then the trial court would have no discretion. The court would have to apply the strict standard rigidly and mechanically in every case, regardless of the length of the delay or the nature of the case. As the following section demonstrates, however, the excusable neglect standard is included in a variety of

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[2/] The court stated that the excusable neglect standard required weighing and balancing the following factors:

> (1) whether the inadvertence reflects professional incompetence such as ignorance of the rules of procedure;
> (2) whether the asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court;
> (3) whether the tardiness results from counsel's failure to provide for a readily foreseeable consequence;
> (4) whether the inadvertence reflects a complete lack of diligence; or
> (5) whether the court is satisfied that the inadvertence resulted despite counsel's substantial good faith efforts toward compliance.

Consolidated Freightways, 827 F.2d at 919 (citations omitted).

other rules, and properly is interpreted flexibly according to the nature of the deadline for which an extension is sought.

Petitioner's advocacy of a rigid and mechanical application of Rule 9006 ignores the fact that Rule 9006 is only one of several rules that incorporates an excusable neglect requirement for obtaining time extensions. *See, e.g.*, Fed. R. Civ. P. 6(b), 13(f), *and* 60(b); Fed. R. App. P. 4(a); Bankr. R. 9033. Under some of these rules a flexible standard is called for; under others a strict standard may be more appropriate. A comparison of the standard of excusable neglect as it is applied in the context of these different rules reveals that "excusable neglect" serves different purposes, with appropriate strict deadlines for certain rules and more flexible deadlines for rules where discretion is appropriate.

Petitioner relies upon a selection of cases interpreting Federal Rule of Appellate Procedure 4(a). (Pet. Br. 24-25). While some courts have applied a strict approach to this jurisdictional deadline, they have done so for a reason that does not apply here. Under Federal Rule of Civil Procedure 73(a), which was the predecessor to Federal Rule of Appellate Procedure 4(a), excusable neglect could only arise where a party failed to learn of the entry of judgment. *Levisa Stone Corp. v. Elkhorn Stone Co.*, 411 F.2d 1208, 1210 (6th Cir. 1969), *cert. denied*, 397 U.S. 925 (1970). It is this particular pedigree of Rule 4(a) that has lead some courts to construe the excusable neglect standard narrowly as it applies to the filing of a notice of appeal. *See Reinsurance*

Co. v. Administratia Asigurarilor de Stat, 808 F.2d 1249, 1251 (7th Cir. 1987).

Contrary to the assertion in Petitioner's Brief that the Court of Appeals for the Sixth Circuit stands alone, courts often apply a flexible standard of excusable neglect in other contexts. For example, under Federal Rule of Civil Procedure 60(b), courts recognize a flexible standard of excusable neglect where consideration of the merits of a case would otherwise be foreclosed. *See, e.g., Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808 (4th Cir. 1988). *Cf. In re Magouirk*, 693 F.2d 948, 951 (9th Cir. 1982) (recognizing flexible standard); *Livingston Powdered Metal, Inc. v. NLRB*, 669 F.2d 133, 136 (3d Cir. 1982) (recognizing flexible standard). That same consideration applies here, where Respondents risk losing their claim for reasons having nothing to do with its merits. When a party seeks a time extension on the basis of "excusable neglect," under general rules such as Federal Rule of Civil Procedure 6(b), the interpretation of excusable neglect also varies according to the nature of the extension being sought. Courts routinely -- and properly -- recognize the need for flexibility in granting short time extensions under these general rules where no bad faith or prejudice can be found. *See, e.g., Dominic v. Hess Oil V.I. Corp.*, 841 F.2d 513, 517 (3d Cir. 1988) (considering good faith under Fed. R. Civ. P. 6(b)); *In re Four Seasons Secs. Laws Litigation*, 493 F.2d 1288, 1290 (10th Cir. 1974)

(considering good faith and prejudice under Fed. R. Civ. P. 6(b)).

In many instances a party may miss a procedural deadline by only a few days. The opposing party would seldom object if no prejudice resulted. If Petitioner's inflexible and strict standard of excusable neglect were always appropriate, then the application of the standard could not vary according to the particular rule and the policy being served. An answer, routine motion, or a brief tendered even one day late could never be filed if it was within the reasonable control of the party to meet the filing deadline. The same would be true of all other filings governed by Bankruptcy Rule 9006 or the similarly worded Federal Rule of Civil Procedure 6(b). Petitioner's proposed standard would essentially convert a Rule mandating flexibility into one inviting imposition of default judgments as an everyday occurrence. Parties would reap financial windfalls from minor procedural defaults.

Like all overly harsh rules, this might promote certainty, but it was not the path chosen by the rule makers, who expressly provided that a party's neglect might be excusable. Application of Petitioner's standard in this case would result in a multi-million dollar windfall to Petitioner that is inconsistent with the policies served by the Bankruptcy Code and that would unduly restrict the discretion of the lower courts that must deal with the practical realities of litigation.

II. IN THE CONTEXT OF RULE 3003, "EXCUSABLE NEGLECT" SHOULD BE INTERPRETED FLEXIBLY.

Because the excusable neglect standard is a flexible one, the question before the Court in this case is how that standard should be applied in a chapter 11 case. In chapter 11 cases, the purposes of the Bankruptcy laws require that the proof of claim deadline not be construed rigidly and mechanically to promote default, as advocated by Petitioner. Rather, the deadline should be more flexibly construed in context by taking into account equitable factors that may excuse the neglect.

Petitioner, however, urges this Court to adopt a strict standard, citing in the abstract a need for certainty and finality. The fallacy in Petitioner's argument and the flaw in the cases upon which it relies is the failure to distinguish the needs and policy considerations in a chapter 11 reorganization case from those in a chapter 7 liquidation case. These important differences in context are reflected in the plain language of the different rules governing the filing of claims in each type of case.

A. Rule 3003 Allows a Time Extension Upon a Showing of Excusable Neglect, Unlike Rule 3002.

The difference between a claims deadline in a chapter 7 liquidation and a chapter 11 reorganization is readily seen by an examination of the plain language of Bankruptcy Rules

3002 and 3003. Except for certain narrow and specific exceptions, the Rule 3002 deadline for filing a chapter 7 proof of claim is absolute. In addition to the literal limitation of "within 90 days," the general standard of "excusable neglect" for late filings under Rule 9006(b) expressly does not apply to excuse a late-filed chapter 7 proof of claim. Bankr. R. 9006(b)(3).

On the other hand, the deadline for filing a chapter 11 proof of claim is much less restrictive. Bankruptcy Rule 3003(c), unlike Rule 3002(c), expressly allows the deadline for filing a chapter 11 proof of claim to be extended "for cause shown." Thus, although a chapter 7 creditor may not obtain a post-deadline extension of time unless it is within one of the narrow specified exceptions to rule 3002(c), a chapter 11 creditor may obtain an extension of time upon a showing of "cause" or "excusable neglect." *See* 8 King, *Collier on Bankruptcy* ¶ 3003.05[4][a] (15th ed. 1989) ("Unlike Rule 3002, Rule 3003(c) does not set up a statute of lin s leaving the court with no discretion to allow late file aims.").

The bankruptcy court's error, which Petitioner urges this Court to repeat, is highlighted by its failure to distinguish the deadline for a chapter 7 proof of claim from a deadline for a chapter 11 proof of claim:

> Under the extreme facts of this case, a finding that the partnerships' claims should be allowed as timely filed would establish a precedent difficult to overcome in Chapter 11 and Chapter 7 asset cases.

(J.A. 173a). As can be seen from the above analysis of the bankruptcy rules, however, precedents set in chapter 11 cases cannot govern in chapter 7 cases. This analytical error not only misled the bankruptcy court in this case, but also is at the heart of the other cases upon which Petitioner relies. As discussed below, the various court of appeals decisions relied upon by Petitioner and by the bankruptcy court fail to distinguish between the strict chapter 7 deadline and the more flexible chapter 11 deadline.

B. The Authorities Cited by Petitioner Fail to Distinguish Chapter 11 from Chapter 7.

The major underpinning of Petitioner's argument is four opinions from circuit courts that have adopted the so-called strict standard. *In re Vertientes, Ltd.*, 845 F.2d 57 (3d Cir. 1988); *Maressa v. A.H. Robins Co.*, 839 F.2d 220 (4th Cir.), *cert. denied*, 488 U.S. 826 (1988); *In re South Atlantic Fin. Corp.*, 767 F.2d 814 (11th Cir. 1985), *cert. denied sub. nom., Biscayne 21 Condominium, Inc. v. South Atlantic Fin. Corp.*, 475 U.S. 1015 (1986); *Hoos & Co. v. Dynamics Corp.*, 570 F.2d 433 (2d Cir. 1978). These cases, however, are not well-reasoned. They involve chapter 11 filings, but their analysis improperly relies upon decisions that interpret Bankruptcy Rule 3002 or other rules that (unlike Bankruptcy Rule 3003) do not permit late, discretionary extensions of time for excusable neglect.

Vertientes, for example, relied heavily upon *In re Pigott*, 684 F.2d 239 (3d Cir. 1982) for the principle that a

bankruptcy court cannot weigh equitable considerations to allow untimely claims. 845 F.2d at 60. *Pigott*, however, was decided under a different statute, 11 U.S.C. § 57(n) and former Rule 302(e). Unlike Rule 3003, both that statute and rule provided for an extension of time *only* if a request for additional time was made prior to the expiration of the time period. 684 F.2d at 242 nn.1, 2. Former Rule 906(b) also expressly excluded Rule 302(e) from use of the general standard of "excusable neglect." *Id.* Thus, in *Pigott* no equitable factors could be considered because there was no provision in the statute or in the rule for post-deadline motions for extension of time. *Vertientes'* reliance on *Pigott* therefore was misplaced because Bankruptcy Rule 3003(c) -- unlike former Rule 302 and unlike present Rule 3002(c) -- specifically gives the bankruptcy court the discretion to consider a post-deadline motion for extension of time in a chapter 11 case.

In addition to *Pigott*, the *Vertientes* court also relied upon three other cases for the principle that equitable factors should not be considered in granting or denying a time extension. All of these underlying cases, however, were based on Rule 3002 or former rules that, unlike Rule 3003, did not permit extensions of time or even motions for extension of time after the expiration of the proof of claim deadline: *In re Stern*, 70 Bankr. 472, 474-75 (Bankr. E.D. Pa. 1987) (applied non-discretionary deadline under Rule 3002); *In re Owens*, 67 Bankr. 418, 423 (Bankr. E.D. Pa. 1986) (applied non-discretionary deadline under Rule 3002),

aff'd, *United States v. Owens*, 84 Bankr. 361 (E.D.Pa. 1988); *In re Supernit*, 186 F.2d 130, 132 (3d Cir. 1950) (applied non-discretionary deadlines under former § 355 of the Bankruptcy Act). Thus, while all the cases underpinning *Vertientes* may have been sound in their own particular context, they do not support the result in *Vertientes*; nor do they support the notion that excusable neglect under Bankruptcy Rule 9006 does not involve the consideration of equitable principles.

The one-page *Maressa* opinion quoted the principle of finality stated in *Hoos & Co. v. Dynamics Corp.*, 570 F.2d 433 (2d Cir. 1978). *Maressa*, 839 F.2d at 221. *Hoos*, however, also involved a rule that expressly excluded late extensions of time. *See Hoos*, 570 F.2d at 437-39 (applied non-discretionary deadline of former Rule 11-33(b)(2)). As in *Pigott*, the rule did not provide for a post-deadline motion seeking an extension of time and was expressly excluded from former Rule 906(b). *Id.* *Hoos* therefore has no application to the discretionary standard under rule 3003(c) in a chapter 11 case and provided no support for *Maressa*, which itself therefore provides no foundation for Petitioner's argument. Finally, *South Atlantic* suffers from the same deficient analysis. It too relied heavily on cases construing

rules that, unlike Bankruptcy Rule 3003, do not permit post-deadline filings. *See* 767 F.2d at 814.[3]

In short, the circuits that have adopted the so-called strict view of excusable neglect in the context at issue here have done so based upon a flawed and incomplete analysis. This Court therefore should reject their inflexible approach and adopt the discretionary approach that permits a consideration of factors such as good faith, lack of prejudice to other parties, and the lack of adverse impact on judicial administration.

C. The Purposes of Bankruptcy Law Require a Flexible Standard of Excusable Neglect in Chapter 11 Cases.

The present Advisory Committee notes to Rule 3003(c) demonstrate that extensions under that Rule should be liberally granted to preserve rather than to forfeit rights. Present Bankruptcy Rule 3003 is adapted from former Chapter X Rule 10-401. *See* Rule 3003 Advisory Committee note. The Advisory Committee notes for the former rule demonstrate that its drafters intended that equitable factors be considered in granting time extensions to creditors who neglect to file claims on time. Because present Bankruptcy

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[3] Petitioner's reliance on this Court's opinion in *United States* v. *Locke*, 471 U.S. 84 (1985) suffers from the same flaw. That case involved deadlines under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744, which did not contain a discretionary excusable neglect standard for time extensions.

Rule 3003 is adapted from this former rule, this history is germane to a proper interpretation of the current rule.

The Advisory Committee notes for former Rule 10-401 explained the purpose served by the rule:

> If the court has fixed a bar date for the filing of proofs of claim, it may still enlarge that time within the provisions of Bankruptcy Rule 906(b) which is made applicable in this subdivision. *This policy is in accord with Chapter X generally which is to preserve rather than to forfeit rights.* [I]t rejects the notion expressed in § 57n of the Act that claims must be filed within a six-month period to participate in any distribution. . . . This approach was intentional as expressed in Senate Report 1916 (75th Cong., 3d Sess., April 20, 1938):
>
> > Sections 204 and 205 insure participation in the benefits of the reorganization to those who, *through inadvertance or otherwise*, have failed to file their claims or otherwise evidence their interests during the pendency of the proceedings.
>
> This attitude is carried forward in the rules, first by dispensing with the need to file proofs of claim . . . in most instances and, secondly, by permitting enlargement of the fixed bar date in a particular case with leave of court and for cause shown *in accordance with the equities of the situation.*

Former Rule 10-401 Advisory Committee note (emphasis added), *reprinted in* 2 King, *Bankruptcy Act and Rules* 1084 (1976 Pamphlet Ed.).

Thus, in a chapter X case, the setting of a claims deadline was for the purpose of preserving rather than forfeiting rights with the granting of an enlargement of time consistent with the "equities of the situation." *Id.* The notes specifically distinguish § 57n which required a filing within six months of the first creditor's meeting. Section 57n was the predecessor of the current 90-day deadline for chapter 7 cases set in Rule 3002(c). *In re Stern*, 70 Bankr. 472, 475 (Bankr. E.D. Pa. 1987). Accordingly, the chapter 11 deadline in Rule 3003(c), as adapted from former Rule 10-401, should also be interpreted to preserve creditors' rights and not automatically to eliminate claims that are tendered after the deadline through inadvertence or otherwise.

D. Proper Analysis of "Excusable Neglect" Involves Consideration of Three Equitable Factors.

The purpose of a filing deadline in a chapter 11 case is to allow the debtor to estimate its potential liabilities so that it can formulate a plan of reorganization. *See In re Chicago Rock Island & Pac. R.R.*, 788 F.2d 1280, 1281 (7th Cir. 1986). This filing deadline is most important when the debtor is in the process of preparing its plan. Obviously, the debtor's ability to formulate a feasible plan is dependent upon what it perceives to be the extent of its liabilities. If

major creditors were routinely permitted to file proofs of claim at any time after the debtor's disclosure statement and proposed plan of reorganization are filed, then the debtor would be forced to amend its plan and disclosure statement or even conclude that reorganization is not feasible. Any resulting delay would also adversely impact efficient court administration. On the other hand, promoting the need for finality through the rigid and arbitrary approach advanced by Petitioner would sacrifice the bankruptcy goals of preserving valid claims and preventing unjustified windfalls.

These competing concerns have been reconciled in the approach taken by the Sixth Circuit in this case and two other courts of appeal that have looked to equitable factors in evaluating claims of excusable neglect. *See In re Dix*, 95 Bankr. 134 (Bankr. 9th Cir. 1988) (Rule 9006); *Consolidated Freightways Corp. v. Larson*, 827 F.2d 916 (3d Cir. 1987) (Fed. R. App. P. 4(a)) (subsequent history omitted). While these courts have applied different labels and different numbers of factors, three considerations lie at the heart of this flexible approach.[4] Respondent submits that these factors are: (1) whether there is prejudice to the debtor or other creditors; (2) the length of the delay and its

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[4] In *Dix*, the court also recognized as a factor to be considered whether "the delay was beyond the reasonable control of the person whose duty it was to perform." 95 Bankr. at 138. As discussed throughout this Brief, this test cannot be used as the sole inquiry in evaluating excusable neglect as Petitioner urges. Nonetheless, Respondent agrees that a finding that the delay was beyond the control of the late-filing party likely establishes that relief is appropriate.

impact on efficient court administration; and (3) whether the creditor acted in good faith. *See Dix*, 95 Bankr. at 138; *Consolidated Freightways*, 827 F.2d at 919. Various specific considerations may fall under each of these headings, and the names of the factors themselves might easily be rephrased. The important point, however, is that these are the three substantive considerations that Respondent submits should guide this Court in fashioning a standard for determining excusable neglect.

The application of these factors will necessarily vary depending on the facts of the situation. For example, even if a creditor has acted in good faith, significant prejudice to the debtor in redrafting or even scrapping its proposed plan of reorganization or a detrimental effect on court administration may require a denial of a motion for an extension of time. This might be the case in a small reorganization involving limited assets and a small number of creditors where the debtor may be able to begin formulating a plan immediately upon the filing of its petition.

In a large, complex bankruptcy case such as this one, however, the debtor may not begin formulating a plan for several months. In fact, Petitioner did not file a proposed plan and disclosure statement until January 2, 1990, over four months after Respondents tendered their proofs of claim. This plan and disclosure statement went through several modifications after discussions with various creditors, including Respondents, resulting in the approval of an amended disclosure statement in April 1990. *See* (J.A.

169a). Thus, as the bankruptcy court found, no prejudice resulted because Petitioner had not begun formulating its plan when Respondents' proofs of claim were tendered, because the filing of the claims did not interfere with Petitioner's ability to formulate its plan, and because the plan specifically makes provision for the allowance of Respondents' claims.

In this case, the Sixth Circuit followed *Dix*, but held that its list of equitable considerations was not exclusive. (J.A. 195a-96a). Thus, it also weighed the absence of culpable conduct on the part of Respondents and weighed the policy of hearing claims on their merits, rather than using default judgments to discipline attorneys. (J.A. 198a-99a). Of course, the factor denominated as "culpable conduct" by the Sixth Circuit might just as easily fit under the heading of "good faith." And attention to furthering the policy of deciding cases on the merits is always appropriate. But whatever titles are given to the relevant factors, the Sixth Circuit was manifestly correct when it concluded that the bankruptcy court applied an incorrect legal standard by placing undue emphasis on whether the admitted neglect was "beyond the reasonable control" of Respondents or their counsel.

III. RESPONDENTS HAVE DEMONSTRATED "EXCUSABLE NEGLECT" AND SHOULD BE ALLOWED TO FILE THEIR PROOFS OF CLAIM.

A. The Bankruptcy Court and Court of Appeals Correctly Found that the Relevant Factors Favor Respondents.

A principled application of these flexible factors compels the conclusion that Respondents' neglect was indeed "excusable." As the court of appeals held, (J.A. 198a), the bankruptcy court correctly resolved all these factors in favor of Respondents. (J.A. 198a). Petitioner does not contest these findings here. *See also, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (under two-court rule, this Court accepts trial court findings affirmed by court of appeals).

Weighing the first factor, prejudice to Petitioner, the bankruptcy court found that Petitioner "will not be prejudiced by granting the filing of [Respondents'] motion beyond the August 3, 1989 bar date." (J.A. 169a). This conclusion stands unchallenged on appeal; no prejudice to Petitioner or to other creditors results from granting Respondents' motion to permit filing of the proofs of claim. Moreover, Petitioner's plan makes provision for payment of Respondents' claims if they are allowed. (J.A. 168a-69a).

The bankruptcy court also correctly resolved the second factor, which considers the impact on efficient court

administration, in favor of Respondents. "[T]he [20 day] delay has had no adverse or negative impact on efficient court administration." (J.A. 169a).

The bankruptcy court also resolved the third factor, good faith, in favor of Respondents. The court found "nothing in the record to suggest that [Respondents] or their former attorney, Marc Richards, acted other than in good faith in the filing of [Respondents'] claims." (J.A. 170a).

Therefore, the bankruptcy court concluded that Respondents had caused no prejudice to Petitioner, had acted in good faith, and had not adversely impacted efficient court administration due to the short delay. These conclusions of the bankruptcy court are not questioned; they are not at issue before this Court. The Sixth Circuit's decision should therefore be affirmed.

B. Whether Respondents Should Be Penalized for the Neglect of their Counsel Is Not a Factor in Determining Excusable Neglect.

The bankruptcy court refused to permit the filing of Respondents' proofs of claim, holding that Respondents should be penalized for the neglect of their attorney Richards, (J.A. 172a), simply because Mr. Berlin had received the Notice for Meeting of Creditors. (J.A. 171a). It did so by placing undue emphasis on the propriety of "penalizing" the neglect of counsel, a fourth factor that had been applied in the Ninth Circuit Bankruptcy Panel's *Dix* opinion. The bankruptcy court's reasoning, however, would

always preclude a finding of excusable neglect whenever a client had notice of a deadline.[2/] This demonstrates this fourth factor should not be an independent consideration at all.

Respondents recognize that, as a general rule in our representative system of litigation, the client is bound by the acts and omissions of its counsel. *Link v. Wabash R.R.*, 370 U.S. 626, *reh'g denied*, 371 U.S. 873 (1962). But it does not follow from this that the client *always* must be penalized for the negligence of its counsel. If the neglect of counsel is excusable under the flexible factor approach, then the client need not be penalized. There is no reasoned basis for concluding, as did the bankruptcy court, that this should be an overriding factor in determining whether the neglect is excusable in the first instance.

[2/] The bankruptcy court concluded that the fact that Mr. Berlin had actual knowledge of the bar date "precludes the court from finding that it would be improper to penalize [Respondents] for the neglect of their attorney." (J.A. 172a). But the appropriate factors already account for this situation by focusing on the bad faith of the attorney or the party. In this case, finding it appropriate to penalize the party for the attorney's misconduct on the mere basis of his knowledge of the bar date is nothing more than a reworded application of the "beyond the reasonable control" standard. If penalizing improper conduct is to be an independent factor, it must be for some *further* misconduct on the part of the attorney or party. Any such situation, however, is already encompassed within the flexible approach Respondents propose to this Court, which includes attention to "bad faith." In this case, the bankruptcy court correctly concluded that there was *no* bad faith on the part of Respondents or their attorney.

In *Link*, the primary case relied upon by Petitioner, the Court held that a federal district court has the power and authority under Federal Rule of Civil Procedure 41 to dismiss a case, *sua sponte* and with prejudice, for a plaintiff's failure to prosecute. *Link*, 370 U.S. at 629. The *Link* Court did observe that, as the result of such a dismissal, the client certainly would suffer because of the negligence and indifference of its counsel. The *Link* Court itself, however, expressly recognized that the aggrieved client could have utilized the "escape hatch" of Rule 60(b) of the Federal Rules of Civil Procedure to avoid being penalized for the neglect of its attorney. *See* 370 U.S. at 632. Significantly, the "escape hatch" to which *Link* referred was the district court's power to set aside a judgment that resulted from excusable neglect, thus implicitly recognizing that a client could avail itself of excusable neglect to avoid the consequences of attorney negligence.[9]

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[9] *Link* certainly does not hold that an attorney's neglect must *always* be used to penalize his client, and Petitioner's broad statement that the sins of the attorney must *always* be visited upon the client obviously is overbroad in light of the many express provisions under which the attorney, and not the client, is penalized for conduct during litigation. *See, e.g.*, 28 U.S.C. § 1927 (attorney liable for costs of vexatious litigation). *Cf.* Fed. R. Civ. P. 11; *Business Guides, Inc. v. Chromatic Communications Enters.*, 111 S. Ct. 922 (1991) (client not liable for Rule 11 sanctions if client himself does not sign filed papers).

Petitioner also cites *United States v. Boyle*, 469 U.S. 241 (1985), for the proposition that reliance on an attorney cannot ever constitute excusable neglect. *Boyle*, however, only holds that under certain circumstances a taxpayer cannot assert that reliance on counsel constitutes the "reasonable cause" that 26 U.S.C. § 6651(a)(1) requires to avoid statutory penalties for filing a tax return late. The *Boyle* Court made no attempt to define the contours of an entirely different standard -- excusable neglect -- in an entirely different context -- the Bankruptcy Code. Moreover, the *Boyle* holding is limited by the unique aspects of our "self-assessment" system of taxation. *See* 469 U.S. at 249. Every taxpayer reasonably may be charged with knowledge of the duty to comply with filing deadlines for tax returns; the *Boyle* Court noted that this duty to file tax returns is a non-delegable duty. *Id.*

This Court also recognized an exception in *Boyle* that a taxpayer's reliance upon professional advice may constitute "reasonable cause" for failure to meet the filing deadline. 469 U.S. 250 (citing *Commissioner v. Lane-Wells Co.*, 321 U.S. 219 (1944); *Haywood Lumber & Mining Co. v. Comm'r*, 178 F.2d 769, 771 (2d Cir. 1950) and other authorities). Were *Boyle* applicable here, this exception would apply. In this case, Mr. Berlin specifically asked his attorney, Mr. Richards, about the time for filing the proofs of claim and was erroneously told that "as there was no bar date, that the filing of [Respondents'] proofs of claim was not a matter of urgency." (J.A. 121a). Reliance upon

counsel in this specialized area of the law distinguishes this case from *Boyle* and illustrates the inequity of entering what is effectively a multi-million dollar default judgment against Respondents based solely on the neglect of their counsel.

Therefore, in determining whether neglect is excusable, this Court should adopt a flexible approach that weighs the impact on efficient court administration, that considers whether there is prejudice to the debtor or other creditors, and that takes into account the good faith of the creditor. Given the findings already made on these factors below, this Court should order that Respondents' proofs of claim be filed.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit permitting Respondents to file their proofs of claim should be affirmed.

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No. 91-1695

In The

Supreme Court of the United States

October Term, 1992

PIONEER INVESTMENT SERVICES, COMPANY,
Petitioner,

vs.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP and WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Petitioner respectfully submits this Brief in reply to the Brief for Respondents.

ARGUMENT

I.

THE CIRCUMSTANCES UPON WHICH RESPONDENTS RELY TO ESTABLISH THEIR CLAIM OF EXCUSABLE NEGLECT ARE NEITHER UNIQUE NOR EXTRAORDINARY.

The circumstances upon which Respondents rely to establish their claim of excusable neglect, the disruption in Mr. Richards' practice and the content and placement of the deadline for the filing of proofs of claim,[1] are neither unique nor extraordinary.[2] Accordingly, Respondents cannot be allowed to file their proofs of claim late, regardless of which interpretation of excusable neglect this Court adopts.

Respondents would have this Court believe that their failure to timely file their proofs of claim in this case resulted from Mr. Richards' resignation from Meyerson & Kuhn. Respondents cite

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1. Brief for Respondents at 2, 3.

2. The courts that have considered the issue of excusable neglect under Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure ("Rule 9006(b)(1)"), unanimously hold that a movant relying upon excusable neglect must show circumstances that are unique or extraordinary. *In re Sasson Jeans*, 96 B.R. 457, 459 (Bankr. S.D.N.Y. 1989); *In re Chateaugy, et al.*, 104 B.R. 617, 619 (Bankr. S.D.N.Y. 1989). This requirement is consistent with the requirement imposed by courts that have considered the issue of excusable neglect under other rules containing the identical term. *650 Park Avenue Corp. v. McRae*, 836 F.2d 764, 767 (2d. Cir. 2d 1988); *Spound v. Mohasco Industries, Inc.*, 534 F.2d 404, 411 (1st Cir. 1976), *cert. denied*, 429 U.S. 886 (1976).

that Mr. Richards resigned effective July 31, 1989 (three days before the expiration of the Bar Date), and that Mr. Richards was denied access to his files until August 15, 1989 (twelve days after the expiration of the Bar Date), App. 56a, implying that Mr. Richards was aware of the Bar Date, and that he would have timely filed Respondents' proofs of claim if he had had access to his files.

The sworn statements of Mr. Richards establish, however, that Mr. Richards was not aware of the Bar Date at the time of his resignation. Mr. Richards swore, under oath, that he had no recollection of having seen the Notice for Meeting of Creditors, App. 29a, which fixed August 3, 1989 as the Bar Date, and that he had no recollection of ever having seen or been made aware of the Bar Date. App. 57a. If Mr. Richards was not even aware of the Bar Date at the time of his resignation, his failure to timely file Respondents' proofs of claim could not have resulted from his resignation.[3]

Moreover, the sworn statements of Respondents contradict Mr. Richards' sworn statements that he had not seen or been made aware of the Bar Date. Respondents allege that Mr. Richards reviewed the Notice for Meeting of Creditors, which fixed August 3, 1989 as the Bar Date, on June 12, 1989. App. at 143a. Respondents state unequivocally that on June 16, 1989, Mr. Richards assured Mr. Berlin that Respondents' proofs of claim would be prepared and filed "within a week". *Id.* Respondents' sworn statements establish that Mr. Richards either knew, or should have known, of the Bar Date, and that he planned to file Respondents' proofs of claim by June 23, 1989. If Mr. Richards

3. Mr. Richards' failure to timely file Respondents' proofs of claim likewise did not result from his lack of access to his files. If Mr. Richards was aware of the Bar Date, and prepared to file Respondents' proofs of claim, he easily could have obtained the duplicate file from Mr. Berlin. App. at 91a-92a.

had done this, then Respondents' proofs of claim would have been filed more than one month before Mr. Richards' resignation.

Regardless of whether one believes Mr. Richards' sworn statements or Respondents' sworn statements, it is clear that resigning from a law firm is not, as a matter of law, either a unique or an extraordinary circumstance. If Mr. Richards was aware of the Bar Date, which he should have been, and he knew that he would resign from Meyerson & Kuhn by July 31, 1989, then Mr. Richards easily could have made arrangements to timely file Respondents' proofs of claim prior to his resignation.

Respondents also rely upon the content and placement of the notice of the Bar Date in the Notice for meeting of Creditors.[4] The Court of Appeals for the Sixth Circuit did not suggest that the Bankruptcy Court was obligated to notify creditors in precisely the form set forth in Official Bankruptcy Form 16. App. 197a. Although Mr. Berlin had no knowledge of bankruptcy practice, App. 88a, he nevertheless is an attorney, a certified public accountant, and an experienced businessman. App. at 128a. It is reasonable to assume, therefore, that Mr. Berlin has the ability to read and to comprehend. Mr. Berlin received and read the Notice. App. 118a. The word "must" clearly is a word of mandatory effect.[5] Mr. Berlin knew, from an ordinary understanding of the English language, that creditors with claims scheduled as disputed, contingent, or unliquidated, and creditors with unlisted claims, were required to file a proof of claim. The Notice then cites to

4. The Notice provided, in pertinent part "You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 U.S.C. § 1111 and Bankruptcy Rule 3003." App. 29a.

5. *See, e.g.*, Webster's Ninth New Collegiate Dictionary 782 (1990) (definition of "must": "be commanded or requested to" ". . . be required by law, custom or moral conscience to . . .)".

specific sections of the Bankruptcy Code and Bankruptcy Rules. Immediately underneath this text appears "Bar Date is August 3, 1989". Bar clearly is understood by lawyers to mean exclude.[6] If Mr. Berlin did not know that the holders of claims specified in the Notice were required to file a proof of claim by August 3, 1989, then, at a minimum, he knew enough to at least ask his bankruptcy counsel what this meant.

Respondents state that "Mr. Richards himself did not recognize August 3, 'bar date' ". Brief for Respondents at 3. Respondents appear to imply that Richards read the Notice for Meeting of Creditors, and that he did not understand the significance of it. Respondents grossly mischaracterize Mr. Richards' sworn statements. Mr. Richards never stated that he did not recognize August 3 as a Bar Date; rather he only stated that he had no recollection of having seen the Notice for Meeting of Creditors. App. 57a. Mr. Richards reviewed Respondents' duplicate file on August 10, 1989. App. 144a. At that time, Mr. Richards obviously recognized August 3 as the Bar Date because he proceeded quickly to file Respondents' motion for an extension. It is clear, therefore, that Mr. Richards' failure to timely file Respondents' proofs of claim did not result from the content and the placement of the Notice.[7]

Petitioner respectfully submits that there are no facts in the record which show that Respondents' failure to timely file their proofs of claim resulted from circumstances that were either unique or extraordinary.

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6. *See, e.g.*, Webster's Ninth New Collegiate Dictionary 130 (1990) (definition of "bar": "to keep out; EXCLUDE").

7. Mr. Richards and Mr. Berlin easily could have verified that the Bar Date was August 3, 1989. Both of them were in Knoxville, Tennessee on June 16, 1989. If they had reviewed the files in the Office of the Clerk of the Bankruptcy Court, they would have seen the Docket Entry Cover Sheet, App. 24a, which stated "CLAIM DEADLINE: 08/03/89 . . .".

II.

EXCUSABLE NEGLECT FOCUSES SOLELY ON COUNSEL'S INADVERTENCE AND THE REASONS FOR IT. IT IS A STRICT STANDARD AND APPLIES ONLY TO EXTRAORDINARY CIRCUMSTANCES.

The plain language of Rule 9006(b)(1) allows relief only when the movant's *failure to act* is the result of excusable neglect.[8] The focus of Rule 9006(b)(1) is, therefore, on, and limited to, the reasons underlying the failure to act. *In re South Atlantic Financial Corporation*, 767 F.2d 814, 819 (11th Cir. 1985), *cert. denied sub nom. Biscayne 21 Condominium Associates, Inc. v. South Atlantic Financial Corp.*, 475 U.S. 1015 (1986). Accordingly, the only relevant inquiry is whether the failure to act resulted from neglect that is, under the circumstances presented, excusable.

Respondents cite the decision of the United States Court of Appeals for the Third Circuit (the "Third Circuit") in *Consolidated Freightways Corp. v. Larson*, 827 F.2d 916 (3rd Cir. 1987), *cert. denied sub nom. Consolidated Freightways Corp. v. Secretary of Transportation*, 484 U.S. 1032 (1988), for the proposition that errors within counsel's control *may* constitute excusable neglect. Brief for Respondents at 9, 10. While the court in *Larson* rejected a per se rule under Rule 4(a)(5), F.R.A.P., it nevertheless limited its inquiry to "the reasons underlying counsel's inadvertence." 827 F.2d at 919.

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8. Rule 9006(b)(1) provides in pertinent part, ". . . when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or order of the court, the court for cause shown may at any time in its discretion . . . (2) on motion made after the expiration of the specified period permit the act to be done where *the failure to act* was the result of excusable neglect." (Emphasis supplied.)

Respondents' reliance upon the decision in *Larson* is, however, clearly misplaced. First, the Third Circuit observed that "There is a qualitative distinction between inadvertence which occurs despite counsel's affirmative efforts to comply and inadvertence which results from counsel's lack of diligence". 827 F.2d at 919. Here, there was a total lack of diligence. Moreover, the Third Circuit required compliance with this threshold requirement, an affirmative effort to comply with the rule, before it would consider the factors that it found to be relevant to the analysis of excusable neglect. 827 F.2d at 921.

In *Larson*, the Third Circuit required a weighing and balancing of five factors, 827 F.2d at 919; however, each of the factors focuses solely on the reasons for the failure to act. To this extent, the decision in *Larson* is consistent with the decisions of other courts that limit the inquiry solely to the reasons for the failure to act. Contrary to Respondents' contention,[9] the decision in *Larson* does not consider "equitable factors".

Indeed, the application of the factors set forth in the decision in *Larson* to the facts of this case shows that the Third Circuit would have denied Respondents relief. The neglect in this case reflects professional incompetence such as ignorance of the rules of procedure. Richards failed to inform himself of how and when the Bar Date is fixed in cases in the Eastern District of Tennessee. Richards' neglect reflects an easily manufactured excuse incapable of verification by the court. Richards' claim that he was denied access to his files cannot easily be verified.[10] Richards failed to provide for a readily foreseeable consequence. If Richards' resignation was a real reason, which it is not, his failure

9. Brief for Respondents at 22.

10. As shown above, Richards' lack of access to his files did not cause him to fail to file Respondents' proofs of claim.

to arrange for the filing of Respondents' proofs of claim would not be excusable. The inadvertence in this case certainly reflects a complete lack of diligence. It is uncontroverted that Richards made no effort whatsoever to file Respondents' proofs of claim.[11] Finally, Richards' inadvertence did not result despite his substantial good faith effort to comply. On the contrary, Richards made no effort to comply with the Bar Date.

The other cases relied upon by Respondents, in arguing for a flexible standard of excusable neglect, clearly are distinguishable. The decision in *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corporation*, 843 F.2d 808 (4th Cir. 1988), is based on the holding that when a party is blameless, the negligence of the party's counsel is excusable. This decision is not good law in view of the decision of this Court in *Link v. Wabash Railroad*, 370 U.S. 626 (1962), which holds that in our representative system of litigation, the client always is bound by the omissions of his counsel and cannot avoid them. *Id.* at 633-634.

The decision in *Livingston Powdered Metal, Inc. v. NLRB*, 669 F.2d 133 (3rd Cir. 1982) clearly is inapposite. The standard at issue was not excusable neglect, it was "good cause" under rules promulgated by the National Labor Relations Board pursuant to the National Labor Relations Act. The case does not discuss "excusable neglect" under any rule of procedure which governs practice in courts of the United States.

In *Dominick v. Hess Oil V.I. Corp.*, 841 F.2d 513 (3rd Cir. 1988), the Third Circuit held that relief would not be granted under Rule 6(b) of the Federal Rules of Civil Procedure, for failure to timely serve a summons and complaint, if there was a lack of

11. Further, Richards was more than negligent, he was indifferent. App. 172a.

diligence or inadvertence by counsel leading to delay. 841 F.2d at 516. Here, the record shows that Richards' lack of diligence, inadvertence, and indiffference caused the delay.

The decision in *In re Four Seasons Securities Law Litigation*, 493 F.2d 1288 (10th Cir. 1974), to the extent it considers lack of prejudice, is incorrectly decided because lack of prejudice and other "equitable factors" are not relevant to the inquiry of whether the *failure to act is the result of excusable neglect. See In re South Atlantic Financial Corp., supra,* 767 F.2d at 818, 819.

III.

CONTRARY TO RESPONDENTS' CONTENTION, THE AUTHORITIES CITED BY PETITIONER DISTINGUISH CHAPTER 11 FROM CHAPTER 7 AND RECOGNIZE THAT THERE IS LIMITED DISCRETION TO GRANT EXTENSIONS OF TIME TO FILE PROOFS OF CLAIM LATE PROVIDED THAT EXCUSABLE NEGLECT IS ESTABLISHED UNDER RULE 9006(b)(1).

Respondents boldly state that the cases upon which Petitioner relies "are not well-reasonsed". Brief For Respondents at 16. Respondents argue that the analysis in these cases relies upon decisions that do not permit late, discretionary extensions of time for excusable neglect. A close reading of each of these cases shows that the courts were aware of the difference between the deadline for the filing of a proof of claim in a chapter 11 reorganization case and the deadline for the filing of a proof of claim in a chapter 7 liquidation case, and that they did not permit late, discretionary extentions of time because they concluded, correctly, that even under Rule 9006(b)(1), "equitable factors" cannot, and should not, be considered.

Respondents devote most of their discussion to the decision of the Third Circuit in *In re Vertientes, Ltd.*, 845 F.2d 57 (3rd Cir.

1988). Brief for Respondents' at 16-18. The Third Circuit did not, contrary to Respondents' contention, rely upon cases decided under statutes providing for no extension of time in reaching its conclusion that a court does not have discretion to grant an extension simply because no prejudice would result, or for any other equitable reason.

The court in *Vertientes* stated that "the old Rule did not allow any such extensions 'for cause shown' ". 845 F.2d at 59. The court in referring to Rule 9006(b), then stated that "The current Rule is clearly different". *Id.* at 59. The court in *Vertientes* concluded "Therefore, under Rule 9006(b)(1), a bankruptcy court does have discretion to extend time to file a proof of claim, but only under the circumstances set forth in the two situations described in the Rule." *Id.* at 59. The court in *Vertientes* recognized that extensions of time could be granted; however, it concluded, correctly, that where the motion is made *after* the expiration of the prescribed time, the extension can be granted only "where failure to act was due to excusable neglect". Lack of prejudice and any other equitable considerations, simply are irrelevant to whether the failure to act was due to excusable neglect.

Respondents criticize the decision in *Hoos & Co. v. Dynamics Corp.*, 570 F.2d 433 (2nd Cir. 1978), because that case involved a rule that Respondents' claim "expressly excluded late extensions of time". Brief for Respondents at 18. While former Rule 11-33(b)(2) contained a non-discretionary deadline, it is not accurate to say, as Respondents do, that the court was without discretion to extend the deadline. In *Hoos*, the Second Circuit specifically referred to Rule 906(b), the predecessor to Rule 9006(b)(1). However, because no action was taken within thirty days after the notice of confirmation, the rule was not applied. 570 F.2d at 439.

The cases upon which Petitioner relies clearly recognize that there is limited discretion to grant an extension of the deadline for

the filing of a proof of claim even after the expiration of the deadline. However, the extension must be sought, and can be granted *only* upon a showing of excusable neglect for *the failure to act*. Equitable factors, such as no prejudice to Petitioner, are not because of the plain language of Rule 9006(b)(1) relevant to this inquiry.

CONCLUSION

For the reasons stated in the Brief for Petitioner, and in this Reply Brief, Petitioner urges this Court to reverse the Court of Appeals and reinstate the judgment of the bankruptcy court in favor of Petitioner.

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